(17,709.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 245.

HENRY CLEWS, CHARLES M. FOSTER, AND JAMES B. CLEWS, PETITIONERS,

vs.

MALCOLM M. JAMIESON, ROLAND C. NICKERSON, HARRY F. BILLINGS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from the circuit court of the United States for the northern district of Illinois	*b*	1
Caption	*b*	1
Placita	1	1
Bill of complaint	2	2
Subpœna	10	9
Marshal's return	11	10
Answer of Malcolm M. Jamieson, Roland C. Nickerson, and Harry F. Billings	11	10
Demurrer of Edwin G. Foreman *et al.*	18	17
Answer of G. A. Schwartz, John Dupee, John W. Conley, and Isaac J. Bloom	20	19
Replication	25	23
Hearing on demurrer	26	24
Order overruling demurrer	27	24
Opinion on demurrer	27	25
Answer of E. G. Foreman, Charles Henrotin, *et al.*	29	26

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 20, 1900.

	Original.	Print
Replication to answer of E. G. Foreman, Charles Henrotin, *et al*	30	28
Order of reference to master	32	29
Master's report	32	29
Provisions and by-laws, Chicago stock exchange	34	30
Telegrams between Schwartz, Dupee & Co. and their brokers	41	36
Clearing-house sheets of August 3, 1896, sent to Schwartz, Dupee & Co.	42	37
Trading cards between Schwartz, Dupee & Co. and Jamieson & Co., August 3, 1896	44	39
Letter of September 9, 1896, from Schwartz, Dupee & Co. to Jamieson & Co.	45	40
Letter of September 10, 1896, from Henry Clews & Co. by Estabrook & Davis to Jamieson & Co.	46	41
Letter of September 22, 1896, from Henry Clews & Co. by Estabrook & Davis to Jamieson & Co.	47	41
Letter of September 26, 1896, from Schwartz, Dupee & Co. to Jamieson & Co.	47	42
Letter of September 24, 1896, from Jamieson & Co. to Schwartz, Dupee & Co.	48	42
Letter of September 23, 1896, from Schwartz, Dupee & Co. to Chicago stock exchange	48	43
Notice of sale of Diamond Match stock	49	43
Memorandum delivered by H. J. Davis to Frank N. Gage, September 22, 1896	51	45
List of settlement prices from Nov. 5 to Dec. 10, 1896	52	46
Objections to master's report	57	50
Exceptions to master's report	58	51
Stipulation as to filing of amended bill and answer, etc	60	52
Order of April 25, 1898, granting leave to file amended bill, etc.	61	53
Amended bill	61	54
Answer of Malcolm M. Jamieson, Roland C. Nickerson, and Harry F. Billings to amended bill	68	60
Stipulation of facts	76	66
Statement of Jamieson & Co. for July 25, 1896	76	66
Statement of Schwartz & Co. for July 25, 1896	77	67
Settlement sheets of stock exchange furnished Jamieson & Co. July 27, 1896	78	68
Statement of Jamieson & Co. for July 27, 1896	79	69
Statement of Schwartz, Dupee & Co. of July 27, 1896	80	70
Settlement sheets of stock exchange furnished Jamieson & Co. July 28, 1896	80	70
Statement of Jamieson & Co. for July 28, 1896	81	71
Statement of Schwartz, Dupee & Co. for July 28, 1896	81	71
Settlement sheets of stock exchange furnished Jamieson & Co. July 29, 189[illegible]	81	72
Statement of Jamieson & Co. for July 29, 1896	82	72
Statement of Schwartz, Dupee & Co. for July 29, 1896	83	73
Settlement sheets of stock exchange furnished Jamieson & Co. July 30, 1896	83	73
Statement of Jamieson & Co. for July 30, 1896	84	74
Statement of Schwartz, Dupee & Co. for July 30, 1896	84	74

	Original.	Print
Settlement sheets of stock exchange furnished Jamieson & Co. July 31, 1896	84	75
Statement of Jamieson & Co. for July 31, 1896	85	75
Statement of Schwartz, Dupee & Co. for July 31, 1896	85	75
Settlement sheets of stock exchange furnished Jamieson & Co. August 1, 1896	85	76
Statement of Jamieson & Co. for August 1, 1896	86	76
Statement of Schwartz, Dupee & Co. for August 1, 1896	86	77
Settlement sheets of stock exchange furnished Jamieson & Co. August 3, 1896	86	77
Statement of Jamieson & Co. to stock exchange, clearing department, August 3, 1896	87	77
Order setting cause for hearing	90	79
Order substituting solicitors	90	79
Hearing	91	80
Opinion	91	80
Judgment	96	84
Petition for appeal	97	85
Assignment of errors	98	86
Order allowing appeal	101	88
Appeal bond	101	88
Index to testimony and other evidence	103	90
Evidence for complainants	106	92
Testimony of H. F. Billings	106	92
Exhibit 1—Letter of September 10, 1896, from Clews & Co. to Jamieson & Co.	106	92
2—Letter of September 9, 1896, from Schwartz, Dupee & Co. to Jamieson & Co.	107	93
3—Letter of September 22, 1896, from Clews & Co. to Jamieson & Co	107	93
4—Letter of September 23, 1896, from Schwartz, Dupee & Co. to Jamieson & Co	108	94
5—Substitution card of August 3, 1896	109	95
Testimony of John W. Conley	110	96
Walter Comstock	114	99
H. F. Billings (recalled)	117	102
Statement as to messages sent and received	117	103
Stipulation as to messages sent and received	118	104
Testimony of Walter Comstock (recalled)	119	104
Exhibit 8—Clearing-house sheet of August 3, 1896	120	106
Testimony of Joseph R. Wilkins	121	107
Exhibit 6—Trading card of August 3, 1896, from Schwartz, Dupee & Co	132	118
7—Trading card of August 3, 1896, from Jamieson & Co	133	118
Constitution and by-laws of Chicago stock exchange	136	121
Clearing-house rules	141	125
Testimony of H. J. Davis	144	128
Exhibit 14—Notice of sale of Diamond Match stock	144	128
15—Notice of adjournment of sale of Diamond Match stock	145	129
16—Letter of September 24, 1896, from Jamieson & Co. to Schwartz, Dupee & Co	146	130

	Original.	Print
Exhibit 17—Letter of September 23, 1896, from Schwartz, Dupee & Co. to Chicago stock exchange	147	130
Stipulation as to facts, &c.	147	131
Evidence for defendants	148	131
Testimony of Frank N. Gage	148	131
Testimony of H. F. Billings	150	133
Stipulation of October 30, 1897, as to facts	154	137
Testimony of Walter Comstock	155	138
Statement of settlement price of Diamond Match stock on Chicago stock exchange from November 5, 1896, to December 10, 1896	157	140
Stipulation as to facts, &c.	159	141
Master's fees for taking proof	160	142
Clerk's certificate	160	143
Præcipe for transcript	161	143
Citation	162	145
Appearance for appellants	164	146
Appearance for appellees	165	146
Stipulation extending time to file briefs	166	147
Order extending time to file briefs	167	147
Order setting cause for hearing	168	148
Order designating Judge Seaman to sit	169	148
Hearing and submission	170	148
Opinion	171	149
Decree	185	162
Petition for rehearing	186	162
Order designating Judge Seaman to sit	187	162
Order overruling petition for rehearing	188	163
Clerk's certificate	189	163
Writ of certiorari	191	164
Return to writ of certiorari	193	164
Stipulation as to return to writ of certiorari	194	165

a *Transcript of Record.*

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1897.

HENRY CLEWS, CHARLES M. FOSTER, and JAMES B. Clews, Appellants,
vs.
MALCOMB M. JAMIESON, ROLAND C. NICKERSON, HARRY F. Billings, Edwin G. Foreman, Charles Henrotin, *et al.*, Appellees.
No. 533.

Mr. Frank O. Lowden, Mr. Henry D. Estabrook, Mr. Herbert J. Davis, counsel for appellants.

Mr. Horace K. Tenney, Mr. Samuel P. McConnell, Mr. M. Lester Coffeen, Mr. Charles F. Harding, Mr. C. H. Wells, counsel for appellees.

Appeal from the circuit court of the United States for the northern district of Illinois, northern division.

Transcript of record filed August 6, 1898.
Printed record filed Sep. 9, 1898.

OLIVER T. MORTON, *Clerk.*

b In the United States Circuit Court, Northern District of Illinois, Northern Division.

HENRY CLEWS ET AL.
vs.
MALCOMB M. JAMIESON ET AL.
In Chancery.

Transcript of Record.

Grosscup, judge.

Frank O. Lowden, H. D. Estabrook, H. J. Davis, solicitors for complainants and appellants.

Horace K. Tenney, Samuel P. McConnell, M. Lester Coffeen, Charles F. Harding, C. H. Wells, solicitors for defendants and appellees.

1 *Placita.*

Pleas in the circuit court of the United States for the northern district of Illinois, northern division, in chancery sitting, at the United States court-room, in the city of Chicago, in said district and division, before the Hon. Peter S. Grosscup, district judge of the United States for the northern district of Illinois, on Monday, the eleventh day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and ninety-eight, and of our Independence the one hundred and twenty-third year.

S. W. BURNHAM, *Clerk.*

HENRY CLEWS, CHARLES M. FOSTER, and James B. Clews *vs.* MALCOLM M. JAMIESON, ROLAND C. NICKERSON, Harry F. Billings, Edwin G. Foreman, Charles Henrotin, A. W. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, H. Herbst, Henry C. Hackney, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William N. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, George A. McClellan, A. L. Dewar, Gustavus A. Schwartz, John Dupee, John W. Conly, and Isaac J. Bloom.	24261.	In Chancery.

Be it remembered that on this day, to wit, the twenty-fifth day of September, 1898, came the complainants in said entitled cause, by their solicitors, and filed in the clerk's office of said court their bill of complaint; which said bill of complaint is in the words and figures following, to wit:

Bill of Complaint. Filed Sept. 25, 1898.

2 Bill of complaint.

To the honorable the judges of the circuit court of the United States within and for the northern district of Illinois, northern division:

Henry Clews, Charles M. Foster and James B. Clews, of the city of New York, and citizens of the State of New York, bring this their bill against Malcolm M. Jamieson, Roland C. Nickerson, Harry F. Billings, Edwin G. Foreman, Charles Henrotin, A. W. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, H. Herbst, Henry C. Hackney, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William N. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, of the city of Chicago, and citizens of the State of Illinois, and George A. McClellan, of Kenilworth, Illinois, and a citizen of the State of Illinois, and A. L. Dewar, of Glencoe, Illinois, and a citizen of the State of Illinois, whose names your orators are unable to more fully set forth; Gustavus A. Schwartz, John Dupee, John W. Conley and Isaac J. Bloom, of Chicago, Illinois, and citizens of the State of Illinois.

And thereupon your orators complain and say that they are residents and citizens of the State of New York, and that all said defendants are citizens of the State of Illinois, residing in the northern district thereof, and that this is a suit of a civil nature in which there is a controversy between citizens of different States in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand (2,000) dollars.

And further complaining, your orators say that they are a copartnership doing business in the city of New York, buying and selling stocks, bonds and other securities, under the name of Henry Clews & Company; that the defendants Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings constitute a copartnership under the name of Jamieson & Company, conducting the business of buying, selling and exchanging bonds, stocks, and other securities, and also a general brokerage business for the purchase and sale of like properties; that in the city of Chicago several years ago there was organized a volunteer association of stock brokers, and persons engaged in the business of buying and selling stocks, bonds, and securities, which association adopted the name of the Chicago stock exchange, and adopted a constitution and by-laws for the government of said association. Said association was formed for the purpose of opening an exchange where its members could meet together and buy and sell such stocks and
3 securities as should be listed with said exchange, and where its members could make contracts for said sales and purchases under the rules and customs of said exchange. Under the constitution and by-laws of said association the whole government of the exchange was vested in a governing committee composed of the president of the exchange and twenty-four (24) members; and your orators show that during the month of July, 1896, and since, the governing committee duly elected and acting as such were, and now are the defendants, Malcolm M. Jamieson, Edwin G. Foreman, Charles Henrotin, A. W. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, H. Herbst, Henry C. Hackney, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William N. Baker, Charles A. Wilson, J. N. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, George A. McClellan and A. L. Dewar.

And further complaining your orators show unto your honors that in the month of July, 1896, they directed their brokers in Chicago, Messrs. Schwartz, Dupee & Company, being composed of Gustavus A. Schwartz, John Dupee, John W. Conley and Isaac J. Bloom, to sell on account of your orators at the rooms of the Chicago stock exchange, and in accordance with its rules and customs, seven hundred (700) shares of capital stock of the Diamond Match Company, a corporation, which stock had been duly listed as one of the stocks which might be sold and purchased in said exchange, and your orators directed said Schwartz, Dupee & Company to sell said shares for delivery on the 31st day of August, 1896. On August 3, 1896, said Schwartz, Dupee & Company sold on said exchange to defendants, Malcomb M. Jamieson, Roland C. Nickerson and Harry F. Billings seven hundred (700) shares of the capital stock of the Diamond Match Company, and agreed and contracted to deliver the same to the said Jamieson & Company, or to such persons as might become the assigns of said contract under the rules of said exchange, on the 31st day of August, 1896; and the said Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings agreed to accept and receive said stock from said Schwartz,

Dupee & Company, on the 31st day of August, 1896, at the agreed price, two hundred and twenty-two dollars ($222) per share for each and every share of said stock.

And your orators show that said sales were made by the said Schwartz, Dupee & Company in their names, but therein they were acting for and in behalf of your orators, as your orators' agents or brokers.

And your orators further show that on the third day of August, 1896, the manager of the clearing-house of said exchange, being thereto by the rules and by-laws of said exchange duly authorized, delivered to said Schwartz, Dupee & Company a statement showing a sale by said Schwartz, Dupee & Company to the said Jamieson & Company of said shares of stock, and said manager also delivered to said Jamieson & Company a statement showing a purchase by said Jamieson & Company from said Schwartz, Dupee & Company of said stock.

4

And your orators further show that on the 31st day of August, 1896, and during the business hours provided by the rules, by-laws and customs of said exchange, the said Schwartz, Dupee & Company tendered to the defendants Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings, certificates for seven hundred (700) shares of stock of the said Diamond Match Company, duly issued by it, and duly endorsed and transferred, so as to vest in the said defendants the title thereto, upon delivery thereof, and the said Schwartz, Dupee & Company then and there offered to carry out said contract of sale, and offered to deliver said shares of stock to the said defendants, but the said defendants refused to accept the same, and refused to carry out said contract of purchase, and refused to pay the said Schwartz, Dupee & Company for said stock.

And further, your orators show that, upon said refusal of said defendants to carry out their contract, the said Schwartz, Dupee & Company informed your orators of said refusal, and on the 11th day of September, 1896, said Schwartz, Dupee & Company in writing notified said defendants Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings that said sale was made by the said Schwartz, Dupee & Company as agents for and on behalf of your orators, and notified said defendants that your orators might rightfully take any proceedings to enforce said contracts of sale, and to make settlement of said transaction. And thereupon, upon the same day, your orators notified the said defendants that your orators would proceed to sell said shares of stock at public auction, to the highest bidder for cash, and that your orators would look to said defendants to pay and settle any difference and any loss or damage accruing to your orators if said stock should sell for less than the price which the said defendants had agreed to pay therefor. And your orators also notified said defendants that in the meantime they held said stock ready for delivery to said defendants upon payment of the amount due on said contracts. But the said defendants utterly refused to pay for and receive said stock, and thereupon your orators proceeded to advertise said stock for sale at public auction.

And thereupon your orators did, on the 22d day of September, 1896, offer the same for sale, at public auction, and the same
5 was struck off to the highest bidder for the sum of one hundred and thirty dollars ($130) per share.

And your orators show that they made every reasonable effort, by advertisement and by bringing notice of said sale before the public, and before brokers and bankers generally in Chicago and vicinity, to induce persons to bid at said sale, but that your orators were unable to obtain a greater sum for said stock than one hundred and thirty dollars ($130) per share.

And your orators further show unto your honors that, on the 31st day of August, 1896, the said shares of stock were worth in the market not to exceed one hundred and thirty dollars ($130) per share, and that your orators have suffered damages to the amount of sixty-four thousand four hundred dollars ($64,400) by reason of the failure of said defendants to accept and pay for said stock, and that the expense of selling the same at auction was the sum of forty-six dollars and seventy-five cents.

And your orators further show, that on the 23d day of September, 1896, they notified said defendants Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings of said sale, and of the amount bid for said stock, and that your orators should hold the said defendants liable for the difference between the price agreed to be paid by said defendants for said stock, and the price bid at said auction, and for all other damages which your orators had sustained by reason of their failure to accept and pay for said stock.

And your orators further show that at the time said contract for the sale of said stock was made upon the stock exchange, the said Schwartz, Dupee & Company, as provided by the rules of the stock exchange, deposited with the clearing-house of said stock exchange the sum of seven thousand dollars ($7,000) in trust as security for the faithful performance on their part and on the part of your orators of said contract of sale, and at the same time the said defendants Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings also deposited with the clearing-house of said stock exchange the sum of seven thousand dollars ($7,000), to be held by the said stock exchange in trust to secure the faithful performance on the part of said defendants of their contract to purchase said stock and to pay for the same; and the manager of said clearing-house, under the rules and by-laws of said Chicago stock exchange, received said sums, and the same now remain in the control and possession of the governing committee of said stock exchange, to wit: the defendants Malcolm M. Jamieson, Edwin G. Foreman, Charles Henrotin, A. W. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, H. Herbst, Henry C. Hackney, F. H. Watriss, C. C. Adsit, C. A. Whyland, A. L. Dewar, J. M. Adsit, Frank N. Gage, Fred G.
6 Frank, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William N. Baker, Charles A. Wilson, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, George A. McClellan.

And your orators further show that on the 24th day of September, 1896, the said Schwartz, Dupee & Company requested the said

Jamieson & Company to consent that the Chicago stock exchange pay to the said Schwartz, Dupee & Company the amounts so deposited to secure the performance of said contract, and offered to credit the said Jamieson & Company with the amount deposited by them, to wit: seven thousand dollars ($7,000), on the damages sustained by reason of the default of said Jamieson & Company. And your orators, in writing, joined in said request and offered upon receipt of said deposit by Schwartz, Dupee & Company to credit the said Jamieson & Company with the amount thereof.

And your orators further show that on the 24th day of September, 1896, the said Schwartz, Dupee & Company notified the defendants above named the governing committee of the Chicago stock exchange that said contracts of sale were made by them on behalf of your orators, and demanded of said the Chicago stock exchange and its governing committee the payment of the amount of said deposits. And your orators in writing concurred in said request.

And further your orators show unto your honors that at and before the transactions hereinbefore set forth, there were in the city of Chicago a large number of holders of stock in the Diamond Match Company, who were very desirous of enhancing the market price and value of the stock in said Diamond Match Company in order that they might profit by such enhancement in value, and a large number of such stockholders agreed among themselves that they would by various means cause said stock to be advertised and brought to the notice of the public; and that they would by various means undertake to create a demand for said stock among investors, capitalists, and financial institutions in order that said holders of stock might profit by the rise in the price and market value thereof. And it was agreed among them that they would mutually assist each other in said undertaking, and in the means to be adopted to enhance the value of said stock, and that they would account to each other for the profits so made by reason of the enhancement of stock held by them, and also by the profits of stock in the future to be purchased by them or some of them so agreeing. That the members so joining in said purpose and undertaking formed what is popularly known as a pool for the purpose of bringing about a rise in the price of the Diamond Match Company stock. That your orators are not informed and cannot set forth the names of the persons constituting said pool, and for that reason can-
7 not make them parties to this bill. But your orators allege that for the purpose of carrying out said agreement and undertaking, the members of said pool authorized or employed or directed certain members thereof to employ brokers to make contracts of purchase upon the said stock exchange, and to increase the dealings in said stock on said exchange, and to buy said stock, and by divers other means to create a demand for said stock, and to cause a rise in the market values and quotations thereof in order that all the members of said pool might thereby profit.

Your orators show that they are informed and believe that said pool was organized, and that the members thereof engaged in said common purpose, but that they have hitherto kept secret the names

of the persons entering into said agreement and undertaking, and have kept secret the exact means adopted by them to carry out said purpose.

And your orators believe and charge the fact to be that although the purchase hereinbefore set forth of seven hundred (700) shares of stock by the defendants Jamieson & Company was made in their own name, and without disclosing whether or not the said Jamieson & Company were purchasing as principals or as agents, that as a matter of fact the said Jamieson & Company in making said purchase were acting for themselves and undisclosed principals or principal; and that in making said purchase they or their undisclosed principals, or both, were acting in pursuance to said agreement and understanding, or by the direction and for the benefit of members of said pool in order that the members of said pool might gain and profit, not only by the enhancement of said stock in said Diamond Match Company, then held by them, but also that they might gain and profit by an expected rise in the market value of said stock so purchased from your orators.

And your orators are informed and believe that all of the defendants or some of them were members of said pool; and that the defendants herein, or some of them, have knowledge or information of the names of the persons composing said pool, and of the agreement between said persons touching the objects thereof, and of the means to be taken to carry out said business, but that all of the defendants refuse to discover the particulars thereof.

And your orators well hoped that no dispute would have arisen touching the said purchase of said stock or the payment therefor, according to said contract, or the payment to your orators of their loss and damage sustained by reason of the default of said Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings, or touching the right of your orators to receive the moneys deposited in the clearing-house on the said the Chicago stock exchange in trust as security for the faithful performance by the said defendants
8 of their contract, but that the said defendants Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings would comply with the reasonable request of your orators to consent that the said money should be paid to your orators, and that said other defendants would comply with your orators' reasonable request to pay said money to your orators, as in conscience and equity said defendants ought to do.

But now so it is may it please your honors, that the said defendants combining and confederating among themselves and with divers other persons, at present unknown to your orators whose names when discovered — pray they may be at liberty to insert herein with apt words to charge them as parties defendant hereto, and contriving how to wrong and injure your orators in the premises, they the said defendants absolutely refuse to comply with such requests, and they, the said Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings, at times pretended that they never made any contract to purchase said stock from Schwartz, Dupee & Company, acting either for themselves or for your orators, and they

at other times pretend that said Schwartz, Dupee & Company never offered to deliver said shares of stock either for themselves or for your orators, and they at other times pretend that your orators have suffered no loss by reason of their failure to perform said contract; whereas, your orators charge the contrary thereof to be the truth. All of which acts, doings and pretenses of the said defendants are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orators in the premises. In consideration whereof, and forasmuch as your orators are entirely remediless in the premises according to the strict rules of the common law and can only have relief in a court of equity where matters of this nature are properly cognizable and relievable.

To the end therefore that the said defendants may, if they can, show why your orators should not have the relief hereby prayed, and may, according to the best and utmost of their respective remembrance, knowledge, information, and belief full, true, direct and perfect answer make to all and singular the premises. And especially that they shall disclose their respective information, knowledge and belief as to the existence of said combination or pool, and of the nature and terms of any agreement between the members thereof relating to the means, methods, or directions to be adopted in attaining the objects of said pool, and what steps were taken in pursuance of said agreements and purposes, but not under oath, oath to said answers being thereby expressly waived. And that the said defendants may come to a fair and just account of all the losses and damages sustained by your
9 orators by reason of the failure of said Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings to accept and pay for said stock; and that the defendants may come to a fair and just account of the amounts deposited in said the Chicago stock exchange, as security for the performance of said contracts; and that the said Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings may be decreed to pay to your orators the amount of said damages; and that said other defendants may be decreed to pay and deliver to your orators said trust fund, and that your orators may be further and otherwise relieved in the premises according to equity and good conscience.

May it please your honors to grant unto our orators the most gracious writ of subpœna of the United States of America to be directed to the said Malcolm M. Jamieson, Roland C. Nickerson, Harry F. Billings, Edwin G. Foreman, Charles Henrotin, A. W. Wheeler, J. J. Townsend, S. S. Chapin, George E. Wright, Henry C. Hackney, H. Herbst, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William N. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, George A. McClellan, A. L. Dewar, Gustavus A. Schwartz, John Dupee, John W. Conley and Isaac J. Bloom and the rest of the confederates, when discovered, thereby commanding them and every of them, at a day certain, under a certain pain therein to be inserted, personally to be and appear before your honors in this honorable court, and then

and there to answer all and singular the premises and to stand to, perform and abide such order and decree therein as — your honors shall seem meet, and your orators shall ever pray.

ESTABROOK & DAVIS,
Solicitors for Complainants.

HERBERT J. DAVIS, *Of Counsel.*

(Endorsed:) Filed Sept. 25, 1896. S. W. Burnham, clerk.

On the same day, to wit: the twenty-fifth day of September, 1896, a writ of subpœna issued out of the clerk's office directed against the defendants in said entitled cause; which said writ, together with the memorandum thereto attached and the marshal's return thereon endorsed, is in the words and figures following, to wit:

10 *Subpœna. Filed Sept. 30, 1896.*

Chancery subpœna.

UNITED STATES OF AMERICA, *Northern District of Illinois, Northern Division,* } *ss:*

The United States of America to Malcolm M. Jamieson, Roland C. Nickerson, Harry F. Billings, Edwin G. Foreman, Charles Henrotin, A. W. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, Henry C. Hackney, H. Herbst, F. H. Watris, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William N. Baker, Charles A. Wilson, J. N. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, George A. McClellan, Gustavus A. Schwartz, John Dupee, John W. Conley, and Isaac J. Bloom and A. L. Dewar, Greeting:

We command you and every of you, that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in the northern division of said district, on the first Monday in the month of November next, to answer the bill of complaint of Henry Clews, Charles M. Foster and James B. Clews, this day filed in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States of America, at Chicago, aforesaid, this 25th day of September, in the year of our Lord one thousand eight hundred and ninety-six, and of our Independence the 121st year.

[SEAL.] S. W. BURNHAM, *Clerk.*

Memorandum.

The above-named defendants are notified that unless they and each of them shall enter their appearance in the clerk's office of said court at Chicago, aforesaid, on or before the day to which the

above writ is returnable, the complainant's bill will be taken against them as confessed, and a decree entered accordingly.

S. W. BURNHAM, *Clerk.*

11 *Return of Marshal. Filed Sept.* 30, 1896.

UNITED STATES OF AMERICA, }
Northern District of Illinois, Northern Division, } *ss:*

I have duly served the within writ in the following manner, to wit: Upon Malcolm M. Jamieson, Roland C. Nickerson, Harry F. Billings, John W. Conley, Isaac J. Bloom and John Dupee, by delivering to each of them a true copy of the same this 29th day of September, A. D. 1896; also upon Gustavus A. Schwartz, Edwin G. Foreman, Charles Henrotin, A. W. Wheeler, J. J. Townsend, C. B. Chapin, George E. Wright, H. Herbst, Henry C. Hackney, F. H. Watriss, C. C. Adsit, B. B. Lamb, B. R. Cahn, C. A. Whyland, George A. McClellan, William V. Baker, A. L. Dewar, Charles C. Yoe, William B. Wrenn, F. N. Gage, Fred G. Frank, J. M. Adsit, D. M. Cummings, W. G. Wasmansdorff and Charles A. Wilson, by delivering to each of them a true copy of the same, this 30th day of September, A. D. 1896.

J. W. ARNOLD,
U. S. Marshal.
JOHN A. LOGAN, *Deputy.*

(Endorsed:) Filed Sept. 30, 1896. S. W. Burnham, clerk.

Afterwards, to wit: on the twenty-eighth day of November, 1896, came Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings, by their solicitors, and filed in the clerk's office of said court their answer to the bill of complaint, which said answer is in the words and figures following, to wit:

Answer of Jamieson, Nickerson, and Billings. Filed Nov. 28, 1896.

Answer.

Circuit Court of the United States, Northern District of Illinois.

HENRY CLEWS ET AL. }
vs.
MALCOLM M. JAMIESON ET AL. }

The separate answer of Malcolm M. Jamieson, Roland C. Nickerson, and Harry F. Billings, defendants, to the bill of complaint of Henry Clews, Charles M. Foster, and James B. Clews.

These defendants, now and at all times hereafter, saving and reserving unto themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertain-

ties or other imperfections in the said bill contained, for
12 answer thereunto, or to so much or such parts thereof as these defendants are advised it is or are material or necessary for them to make answer unto, answering, say:

These defendants admit that in the month of July, 1896, they constituted a copartnership under the name of Jamieson and Company, and were conducting a business of buying, selling and exchanging bonds, stocks and other securities, and also a general brokerage business for the purchase and sale of like properties. But they say that in the month of July, 1896, they bought and sold neither bonds, stocks, nor securities for themselves, and that the firm of Schwartz, Dupee and Company, mentioned in said bill as the agents of the complainants, were so informed and well knew. They admit that there was in existence in July, 1896, in the city of Chicago, a voluntary association of stock brokers known as the Chicago stock exchange, and that such association had adopted a constitution and by-laws for the government of said association, and that said association was formed for the purpose of opening an exchange, where its members could meet together to buy and sell such stocks and securities as should be listed with said exchange.

Further answering, they admit that the whole government of the said stock exchange was vested in a governing committee, as set out in the said bill of complaint.

These defendants further answering, say that they do not know whether or not in the month of July, 1896, or at any other time, the complainants directed Gustavus A. Schwartz, John Dupee and John W. Conley, a firm doing business in Chicago, under the title of Schwartz, Dupee and Company, to sell on their account at the rooms of the stock exchange and in accordance with its rules and customs, seven hundred (700) shares of the capital stock of the Diamond Match Company. They know no more regarding said matter, than that the said Schwartz, Dupee and Company, did, from time to time, buy and sell stocks and securities on the said stock exchange; but whether said firm in July, 1896, or at any other time, had any dealings with or any directions from the complainants in the said bill of complaint, these defendants are entirely ignorant, and demand from the complainants strict proof thereof.

These defendants, answering further, deny that on August 3, 1896, said Schwartz, Dupee and Company sold on said exchange to these defendants seven hundred (700) shares of the capital stock of the Diamond Match Company, to be delivered to these defendants, or their assigns, on the 31st day of August, 1896. And they deny that these defendants agreed at that time, on the date mentioned,
or at any other time, to accept and receive from said Schwartz,
13 Dupee and Company seven hundred (700) shares of the capital stock of the Diamond Match Company, at the price of two hundred twenty-two dollars ($222) per share for each and every share of said stock.

Defendants further answering, say they do not know whether or not on the 31st day of August, 1896, the manager of the clearing-house of the said exchange delivered to said Schwartz, Dupee and

Company, a statement, showing a sale by said Schwartz, Dupee and Company to the said Jamieson and Company of said seven hundred (700) shares of stock; and they deny that any such statement was furnished by the said manager to these defendants.

These defendants further answering, say that they admit that on the 31st day of August, 1896, the said Schwartz, Dupee and Company tendered to these defendants certificates for seven hundred (700) shares of stock of the said Diamond Match Company, but whether they were duly issued by the said Diamond Match Company, or whether they were endorsed and transferred so as to vest, if accepted, in the said defendants the title thereto upon the delivery thereof, these defendants do not know. They do admit, however, that tender of said seven hundred (700) shares of stock, and their refusal to accept and pay for the same.

Further answering, these defendants say they do not know whether the said Schwartz, Dupee and Company, informed the complainants of said refusal, or not; but they admit that on the 11th day of September, 1896, Schwartz, Dupee and Company, in writing, notified these defendants that said sale was made by the said Schwartz, Dupee and Company, as agents for and on behalf of the complainants, and notified these defendants that the complainants might rightfully take proceedings to enforce said contract of sale, and to make settlement of said transaction, and that upon the same day the complainants notified these defendants that they would proceed to sell said shares of stock at public auction, to the highest bidder for cash, and that the complainants would look to these defendants to pay and settle any difference, and any loss or damage accruing to the complainants, if said stock should sell for less than the price which the said complainants pretended and still pretend, that the defendants had agreed to pay therefor.

And defendants further answering, say that they informed Schwartz, Dupee and Company, upon the 31st day of August, 1896, and said complainants upon the 11th day of September, 1896, that any contracts which they had made with Schwartz, Dupee and Company, at any time in the month of July, 1896, had been made for and on account of W. H. and J. H. Moore.

14 And these defendants, further answering, say that they do not know whether, on the 22d day of September, 1896, the complainants offered for sale at public auction the said seven hundred (700) shares of stock, and they do not know whether the said stock was sold at one hundred thirty dollars ($130) per share to the highest bidder. And as to both the matter of sale and the amount paid, these defendants demand strict proof.

And these defendants, further answering, say that they do not know what advertisement or what other efforts were made to bring the notice of the said sale, if such occurred, before the public, and before brokers and bankers generally, and as to these matters they demand strict proof.

And these defendants, further answering, say that on the said 31st day of August, 1896, the said shares of stock were worth in the market more than one hundred thirty dollars ($130) per share, and

they deny that the complainants suffered damages to the extent of sixty-four thousand four hundred dollars ($64,400) by reason of the failure of these defendants to accept and pay for said stock.

Further answering, these defendants admit that on the 23d day of September, 1896, the complainants notified them of said sale, and of the amount bid for said stock, and that the complainants proposed to hold these defendants liable for the difference between the price which the complainants aver—but which these defendants deny—was agreed to be paid by these defendants for said stock and the price bid at said auction, and for other damages which the complainants pretend they have sustained by reason of these defendants' failure to accept and pay for said stock.

And these defendants, further answering, deny that at the time of the said pretended contract for the sale of said stock, the said Schwartz, Dupee and Company, deposited seven thousand dollars ($7,000) with the clearing-house of said stock exchange, as security for the faithful performance on their part and on the part of the complainants, of said contract of sale, and that at the same time these defendants deposited with the clearing-house of said stock exchange the sum of seven thousand dollars ($7,000), to be held by the said stock exchange, in trust, to secure the faithful performance on the part of these defendants of any contract to purchase said stock and to pay for the same.

These defendants admit that on the 24th day of September, 1896, the said Schwartz, Dupee and Company, requested these defendants to consent that the Chicago stock exchange pay to the said Schwartz, Dupee and Company seven thousand dollars ($7,000), which they then and there pretended had been deposited on account of the said pretended purchase and sale, and offered to credit these defendants with seven thousand dollars (7,000), and these defendants do not deny that the complainants joined in the request and offer regarding said deposit by said Schwartz, Dupee and Company.

And these defendants, further answering, say that they do not know whether on the 25th day of September, 1896, the said Schwartz, Dupee and Company notified the governing committee of the Chicago stock exchange, that certain contracts of sale with these defendants, were made by them on behalf of the complainants, and then and there demanded of the Chicago stock exchange and its governing committee, the payment to them of certain deposits, or whether the complainants, in writing, concurred in said request.

And these defendants, further answering, say that they neither admit nor deny the averments in the bill of complaint, that there was a large number of holders of stock in the Diamond Match Company in the city of Chicago, and prior to the transactions set out in the said bill of complaint, who were desirous of enhancing the market price, and value of the stock of the said Diamond Match Company, in order that they might profit by said enhancement in value, and that a large number of the holders of said stock agreed that they would, by said means, cause said stock to be advertised

and brought to the notice of the public, and that they would, by various means, create a demand for said stock among investors and capitalists, in order that said holders of stock might profit by the rise in price and market value thereof; and that it was agreed among them that they would mutually assist each other, and account to each other for the profits to be made if the stock were advanced in value; that they formed a pool for the purpose of bringing about a rise in prices of the stock of the said Diamond Match Company; that for the purpose of carrying out such agreement and undertaking, the said holders of stock authorized or employed certain brokers and members of the Chicago stock exchange to make contracts of purchase upon the stock exchange, and to buy said stock, and by divers other means to create a demand for said stock, and to cause a rise in the market values and quotations thereof.

And these defendants, further answering, say that they neither admit nor deny that they acted for any others than J. H. and W. H. Moore, in dealings upon the stock exchange in the Diamond Match Company stock.

These defendants, further answering, say that the only purchase of Diamond Match Company stock made by them from the said Schwartz, Dupee and Company, in the month of July, 1896, or August, to be delivered August 31st, or any day in that month was for fifty (50) shares of stock, and that they are informed and believe that the said fifty (50) shares of stock were not sold by the said Schwartz, Dupee and Company for the complainants herein.

16 And these defendants, further answering, say that on the 3d day of August, 1896, the Chicago stock exchange was closed by order of the governing committee thereof, and so remained closed until the 5th day of November, 1896, and that from the said August 3d to the said November 5, 1896, there were no purchases or sales of stocks or securities upon the Chicago stock exchange.

And these defendants further answering, say that whatever purchases of stock were made, or agreements to purchase, by these defendants, from the said Schwartz, Dupee and Company, acting for themselves, or as agents for the complainants herein, were made in view of, because of, and entirely on account of the constitution, by-laws and rules of the Chicago stock exchange.

And these defendants, further answering, say that it is provided in and by article XVII of the by-laws of the said Chicago stock exchange, of which the defendants and Schwartz, Dupee and Company were members, as follows:

"Should any member neglect to fulfill his contract on the day it becomes due, the party or parties contracting with him shall, after giving notice as required by section 2 of the preceding article, employ an officer of the board to close the same forthwith in the exchange, by purchase or sale as the case may require, unless the price of settlement has been agreed upon, by the contracting parties: In case of a failure of a creditor to close the contract as above, the price shall be fixed by the price current at the time such contract ought to have been closed under the rule. In all cases where an officer may be directed to buy or sell securities under this rule, the name

of the member defaulting, as well as that of the member giving the order shall be announced. No order for the purchase or sale of securities under this rule shall be executed unless made out in writing over the signature of the party giving the order, who shall state the reason therefor; and it shall be the duty of the officer who executes the order to endorse thereon the name of the purchaser or seller, the price and the hour at which the contract is closed, and hand the same to the secretary of the board, who shall within twenty-four hours, ascertain whether the party for whose account the order was given has paid the difference, if any, arising from the transaction; if not the secretary shall report the default to the president. The duty devolved upon the officers of the exchange under this rule shall be performed without charge. No party shall be permitted to supply offers to buy or sell securities closed for his account under the rule; and when a contract is closed under this rule any action of the defaulter, direct or indirect, by which the prompt fulfillment of such contract is delayed, hindered or evaded to the detriment of the other contracting party, shall subject the offending party to suspension for not less
17 than thirty days in the discretion of the governing committee, by a vote of two-thirds of the members present at the meeting. When contracts are closed out under the rule, any member supplying the bid or offer, and not duly receiving or delivering the stock, as the case may be, renders himself liable to prosecution under this article. Should any stock thus sold not be delivered until the next day, the contract shall continue, but the defaulting party shall be liable to pay such damage as may be assessed by the arbitration committee. The same rules as to notice, time and place, that govern defaults in other contracts, shall apply to borrowed securities, which on non-delivery or receipt, must be borrowed or loaned in open market, except in case of actual default in receiving or delivering, after notice to close the loan; then the same are to be bought or sold, as the case may be, for account of the defaulter in the manner provided in this article."

These defendants, further answering, say that the notice provided in section 2 of article XVI, and referred to in said article XVII, reads as follows:

"The notice above referred to shall be either personal or shall be left in writing at the office of the party to be notified, or in case he has no office, then by public announcement, whenever the exchange may be in session."

And these defendants, further answering, say that both buyers and sellers of stock on the stock exchange, were entitled to the protection and advantages afforded by the constitution, by-laws and rules of said stock exchange, and that only upon said stock exchange was it possible, or is it now, in the city of Chicago, to obtain a fair or adequate price for stocks which are covered by contracts of either sale or purchase, made between members thereof.

And these defendants, further answering, say that all contracts for purchase or sales of stock, whether of the Diamond Match Company, or of any other stocks, made between said Schwartz, Dupee

and Company and these defendants, in the month of August, 1896, were made under the by-laws above set forth, and with the agreement that said by-law should be a part of the contract.

And these defendants, further answering, say that during the time said stock exchange was closed, from the said August 3d until November 5, 1896, there were no means of carrying out the contracts made between the members thereof, for the purchase and sale of stocks or other securities, and that in consequence thereof, all purchase contracts failed, or settlements thereof must have been deferred until the opening of said stock exchange.

And these defendants submit to this honorable court, that
18 all and every the matters in complainant's bill mentioned and complained of, are matters which may be tried and determined at law, and with respect to which the complainants are not entitled to any relief from a court of equity. And these defendants ask that they shall have the same benefit for their defense, as if they had demurred to the complainant's bill, and pray to be dismissed with their reasonable costs and charges, in this behalf most wrongfully sustained.

MALCOLM M. JAMIESON,
ROLAND C. NICKERSON, AND
HARRY F. BILLINGS,
By TENNEY, McCONNELL & COFFEEN,
Their Solicitors.

TENNEY, McCONNELL & COFFEEN,
Solicitors for Above Defendants.

(Endorsed:) Filed Nov. 28, 1896. S. W. Burnham, clerk.

Afterwards, to wit, on the 4th day of December, 1896, came Edwin G. Foreman, Charles Henrotin, A. W. Wheeler, J. J. Townsend, S. B. Chapin, Geo. E. Wright, Henry C. Hackney, H. Herbst, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William V. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, Wm. B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, Geo. A. McClellan and A. L. Dewar, by their solicitors, and filed in the clerk's office of said court their demurrer to the bill of complaint, which said demurrer is in the words and figures following, to wit:

Demurrer. Filed Dec. 11, 1896.

Demurrer.

UNITED STATES OF AMERICA, *Northern District of Ill., Northern Division,* } *ss:*

In the Circuit Court Thereof.

HENRY CLEWS ET AL. *vs.* MALCOLM M. JAMIESON ET AL. } In Chancery.

The demurrer of Edwin G. Foreman, Charles Henrotin, A. W. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, Henry C. Hackney, H. Herbst, F. H. Watriss, C. C. Adsit, C. A.
19 Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William V. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, George A. McClellan, and A. L. Dewar, certain of the defendants, to the bill of complaint of Henry Clews *et al.*, complainants.

These above-named defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, demur to said bill; and for cause of demurrer show, that the complainant has not in and by his said bill made or stated such a case as entitles him in a court of equity to any discovery or relief from, or against, these defendants touching the matters contained in said bill or any of such matters; for the reason that the said complainants have a full, complete and adequate remedy at law against all the defendants in the said bill of complaint for the causes of action set forth in the said bill. And for a further cause of demurrer, to so much of said bill as seeks discovery from these above-named defendants in regard to the formation and operation of a so-called "pool," the said complainants do not, in their said bill, seek any recovery from these above-named defendants, or any of them, as unknown principals in said so-called "pool," and show no right to call upon them, or any of them in a court of equity, for a discovery of said matters and things in regard to said so-called "pool." Wherefore, these defendants demur to the said bill, and to all the matters and things therein contained, and pray the judgment of this honorable court whether they shall be compelled to make any further or other answer thereto; and pray to be dismissed with their reasonable costs in this behalf sustained.

CHESTER M. DAWES,
Solicitor for Above-named Defendants.

I certify that in my opinion the foregoing demurrer of Edwin G. Foreman, Charles Henrotin, A. W. Wheeler, J. J. Townsend,

S. B. Chapin, George E. Wright, Henry C. Hackney, H. Herbst F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb Charles C. Yoe, William V. Baker, Charles A. Wilson, J. M. Adsit Frank N. Gage. Fred. G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, George A. McClellan and A. L. Dewar, to the bill of complaint of Henry Clews *et al.*, complainants, is well founded in law and proper to be filed in the above cause.

CHESTER M. DAWES,
Solicitor for Above-named Defendants.

Chicago, December 4th, 1896.

20 UNITED STATES OF AMERICA
Northern District of Ill., Northern Division, } ss:

In the Circuit Court Thereof.

HENRY CLEWS ET AL.
vs.
MALCOLM M. JAMIESON ET AL. } In Chancery.

STATE OF ILLINOIS,
Cook County, } ss:

C. C. Adsit, on oath says that he is one of the defendants in the above-entitled cause and authorized to make affidavit for and on behalf of the other above-mentioned defendants; that he has heard read the foregoing demurrer to the bill of complaint of Henry Clews *et al.* in this suit, and that the same is not interposed for the purpose of delaying said suit, or any proceedings therein.

C. C. ADSIT.

Subscribed and sworn to before me this 5th day of December, 1896.

[SEAL.]

BENJAMIN R. CAHN,
Notary Public.

(Endorsed:) Filed Dec. 4, 1896. S. W. Burnham, clerk.

Afterwards, to wit: on the eighth day of December, 1896, came Gustavus A. Schwartz, John Dupee, John W. Conley and Isaac J. Bloom by their solicitors, and filed in the clerk's office of said court their answer to the bill of complaint, which said answer is in words and figures following, to wit:

Answer of Schwartz, Dupee, Conley & Bloom. Filed Dec. 8, 1896.

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

HENRY CLEWS, CHARLES M. FOSTER, and JAMES B. CLEWS
vs.
MALCOLM M. JAMIESON ET AL. } 24261.

The joint and several answers of Gustavus A. Schwartz, John Dupee, John W. Conley, and Isaac J. Bloom, four of the
21 defendants, to the bill of complaint of Henry Clews, Charles M. Foster, and James B. Clews, complainants.

These defendants, reserving to themselves all right of exception to the said bill of complaint, for answer thereto say:

They admit that the complainants are citizens of the State of New York, and that all of the defendants are citizens of the State of Illinois, and that there is in this suit a controversy in which the matter in dispute exceeds, exclusive of interest and costs, the sum and value of two thousand dollars ($2,000).

They admit that complainants are a copartnership, doing business under the name of Henry Clews & Company, and that the defendants Jamieson, Nickerson and Billings constitute a copartnership doing business under the name of Jamieson & Company. They admit that several years ago there was organized a voluntary association of persons engaged in the business of stock brokers, which association adopted the name of the Chicago stock exchange, and adopted a constitution and by-laws for the government of said association. They admit that said association was formed for the purpose of opening an exchange where its members could meet together and buy and sell stocks and securities, and to make contracts for sales and purchases of said stocks and securities under the rules and customs of said exchange. They admit that the government of said exchange was vested in a government committee composed of the president of the exchange and twenty-four (24) members, which committee in the month of July, 1896, and since then, were constituted, as set forth in the bill of complaint.

They admit that in the month of July the complainants directed these defendants, as brokers for complainants, to sell on account of the complainants on the Chicago stock exchange, and in accordance with its rules and customs, seven hundred (700) shares of the Diamond Match Company stock, and that said stock had been duly listed as one of the stocks which might be bought and sold on said exchange, and admit that the complainants directed these defendants to sell the said number of shares for delivery on the 31st day of August, 1896.

Further answering, these defendants say that in compliance with said direction of the complainants these defendants did, on the 25th day of July, on the said exchange, sell and contract to deliver to

various brokers dealing on said exchange various amounts of stock of said Diamond Match Company, to wit: the aggregate amount of five hundred (500) shares, and contracted to deliver to the said brokers, or their assigns, the said five hundred (500) shares of stock, delivery to be made in accordance with the rules of said exchange on the 31st day of August, 1896. And that on the 27th day
22 of July, 1896, in complying further with the order of said complainants these defendants sold, on the said exchange, the further amount of two hundred (200) shares of said stock for delivery on the 31st day of August, 1896.

And further answering these defendants say that on the 3d day of August, 1896, the defendants Jamieson, Nickerson and Billings, with the consent of these answering defendants and by the consent of the brokers to whom said stock had been originally sold, and by the agreement of said Jamieson, Nickerson and Billings became the assignees of said purchasers, and by their agreement and the agreement of the parties to said contracts they, the said Jamieson, Nickerson and Billings, became substituted as the purchasers of said stock, and agreed to receive the same in accordance with the original contract of sale made by these answering defendants, and agreed to pay for said stock on the 31st day of August, 1896, the sum of two hundred and twenty-two dollars ($222) per share for said seven hundred (700) shares of stock.

And further answering these defendants admit that said sales and said contract were made in the names of these defendants, but that these answering defendants in making the same were acting in pursuance of the direction of complainants and on behalf of the complainants, and for their benefit; and that said contracts were made by these answering defendants as agents or brokers for the complainants.

These defendants further answering, admit that on the 3rd day of August, 1896, the manager of the clearing-house of said Chicago stock exchange, and being duly authorized by the rules of said exchange, delivered to these defendants a statement or memorandum of said sales among others, which statement showed that these defendants had sold to the defendants Jamieson, Nickerson and Billings, for delivery on August 31, 1896, eleven hundred and fifty (1,150) shares of Diamond Match Company stock at the price of two hundred and twenty-two — ($222) per share, which amount of stock included the seven hundred (700) shares sold on account of the complainants; the other four hundred and fifty (450) shares being sales made on account of other clients of these defendants. And these defendants admit that on said 3rd day of August the said manager of the clearing-house of said exchange also delivered to said Jamieson & Company the statement showing the purchase by them from these defendants of said shares of stock.

And these defendants further admit that on the 31st day of August, 1896, and within the time provided by the rules, by-laws and customs of said exchange, these defendants tendered to the defendants Jamieson, Nickerson and Billings certificates for seven hun-
23 dred (700) shares of stock of the Diamond Match Company, sold as aforesaid, and also for four hundred and fifty (450)

shares, sold as aforesaid, on account of other clients of these defendants, which said certificates were duly endorsed and transferred so as to vest the title thereto upon delivery thereof; and these defendants then and there offered to carry out their said contracts for the sale of said stock and offered to deliver all of said shares to the defendants Jamieson, Nickerson and Billings upon payment therefor, but that said Jamieson, Nickerson and Billings refused to accept said shares of stock, or any of them, and refused to pay for said stock.

And further answering, these defendants say that thereupon they informed the complainants of the refusal of said Jamieson & Company to accept and pay for said stock. They admit that on the 11th day of September, 1896, they notified said defendants Jamieson, Nickerson, and Billings that the sale of seven hundred (700) shares of stock was made by these defendants, as agents or brokers for and on behalf of the complainants, and notified said Jamieson & Company that the complainants might rightfully take any proceedings to enforce said contracts of sale, and to make settlement of said transaction so far as related to seven hundred (700) shares of said stock; these defendants being unwilling to commence any proceedings in their own names.

Further answering, these defendants say that they have no personal knowledge as to whether the complainants notified Jamieson & Company that they would proceed to sell said shares of stock at public auction and look to Jamieson & Company to pay any loss or damage on account of the refusal of said Jamieson & Company to accept the same, but these defendants are informed and believe that the complainants did so notify said Jamieson & Company.

Further answering, these defendants say they admit that the complainants did proceed to advertise said sale at public auction, and did, on the 22d day of September, 1896, offer the same for sale at public auction, and that on said day complainants did offer for sale seven hundred (700) shares of stock of the Diamond Match Company, said stock being evidenced by the certificates of the said Diamond Match Company, being the same certificates tendered by these defendants on August 31, 1896, and that these defendants admit that on the 22d day of September, at public auction, the shares being offered for sale to the highest bidder for cash, were struck off to the highest bidder therefor, the highest bid being the sum of one hundred and thirty dollars ($130) per share.

Further answering, these defendants say they have no personal knowledge as to what efforts were made by the complainants to bring notice of said sale before the public, except that the
24 defendants admit that said sale was advertised by circular letters and by notices in the newspapers circulating in the city of Chicago.

And these defendants further answering, say they have no knowledge as to whether the complainants on the 23d day of September notified the defendants, Jamieson & Company, of said sale at auction, except by information received from the solicitors of said complainants.

Further answering, these defendants admit that at the time said contracts for the sale of said stock were made upon the stock exchange these defendants, as provided by the rules of said exchange, deposited with the clearing-house of said Chicago stock exchange the sum of seven thousand dollars ($7,000.00), and at the same time the said defendants Jamieson, Nickerson, and Billings also deposited in said clearing-house the sum of seven thousand dollars ($7,000.00). They admit that said sums, to wit: fourteen thousand dollars ($14,000.00), now remain on deposit in the clearing-house aforesaid, in trust, as security for the protection of said contracts. They admit that said sums were received by the manager of the said Chicago stock exchange, and are now in the control and possession of the governing committee of said stock exchange, as a trust fund to secure the performance by the parties to said contracts respectively of their obligations under said contracts of purchase and sale. And further answering in this behalf, these defendants say that they advanced the said sum of seven thousand dollars ($7,000.00) on account of the complainants and charged the complainants with said amount, there being at the time an open book account between these defendants and said complainants, and that these defendants look to complainants to reimburse them for the amount so advanced.

Further answering, these defendants admit that on the 24th day of September, 1896, they requested, in writing, the said Jamieson & Company to consent that the Chicago stock exchange should pay to these defendants the amount so deposited to secure the performance of said contract, and offered to credit the said Jamieson & Company with the amount deposited by them, to wit: seven thousand dollars ($7,000.00), on account of the damages sustained by reason of the default of said Jamieson & Company, and that the complainants joined in said request. They admit that on the 24th day of September they notified the governing committee of the stock exchange that said sales on the exchange of said seven hundred (700) shares of stock, were made by these defendants on behalf of the complainants, and requested the said Chicago stock exchange and its governing committee to pay to these defendants the amount of said deposits, and that the complainants joined in said request.

25 Further answering, these defendants say they admit that in the contracts for the purchase of said stock on the Chicago stock exchange the said Jamieson & Company acted in their own names, and did not disclose whether or not they were acting as agents or on their own behalf.

They admit that the defendants Jamieson, Nickerson and Billings refused to consent to the payment, by the governing committee, of the amount deposited in the clearing house of said exchange, as aforesaid, in trust, to secure the parties to said sale against loss by reason of failure to comply with said contract. All which matters and things these defendants are ready to maintain and prove as this honorable court shall direct.

JOHN DUPEE.
GUSTAVUS A. SCHWARTZ.
JOHN W. CONLEY.
ISAAC J. BLOOM.

(Endorsed:) Filed Dec. 8, 1896. S. W. Burnham, clerk.

Afterwards, to wit: on the twenty-fourth day of December, 1896, came the complainants in said entitled cause by their solicitors, and filed in the clerk's office of said court their replication to the answer of Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings, which said replication is in the words and figures following, to wit:

Replication. Filed Dec. 24, 1896.

Replication.

Circuit Court of the United States, Northern District of Illinois.

HENRY CLEWS ET AL.
vs.
MALCOLM M. JAMIESON ET AL. } 24261.

The replication of Henry Clews, Charles N. Foster, and James B. Clews, complainants, to the separate answer of Malcolm M. Jamieson, Roland C. Nickerson, and Harry F. Billings, defendants.

These repliants, saving and reserving to themselves all, and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereto say, they will aver and prove their said bill to be true, certain and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by
26 these repliants; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants are, and will be, ready to aver and prove, as this honorable court shall direct; and humbly pray, as in and by their said bill they have already prayed.

ESTABROOK & DAVIS,
Solicitors for Complainants.

(Endorsed:) Filed Dec. 24, 1896. S. W. Burnham, clerk.

Afterwards, to wit: on the eighth day of February, 1897, in the December term of said court, 1896, in the record of proceedings thereof in said entitled cause before the Hon. Peter S. Grosscup, district judge, appears the following entry, to wit:

Hearing on Demurrer.

Order.

Circuit Court of the United States, Northern District Illinois, Northern Division.

Present: Hon. Peter S. Grosscup, district judge.

MONDAY, *February* 8, 1897.

HENRY CLEWS ET AL.
vs.
MALCOLM M. JAMIESON ET AL. } 24261.

Now come the parties by their solicitors. Now comes on to be heard the demurrer to the bill of complaint herein. The court, after hearing the arguments of counsel in full, takes the matter under advisement.

Afterwards, to wit, on the first day of March, 1897, in the December term of said court, 1896, in the record of proceedings thereof in said entitled cause before the Hon. Peter S. Grosscup, district judge, appears the following entry, to wit:

27 *Order Overruling Demurrer. Filed M'ch* 1, 1897.

Order.

Circuit Court of the United States, Northern District of Illinois, Northern Division.

MONDAY, *March* 1, 1897.

Present: Hon. Peter S. Grosscup, district judge.

HENRY CLEWS ET AL.
vs.
MALCOLM M. JAMIESON ET AL. } 24261.

The court having considered and being now fully advised in the premises, it is ordered that the demurrer filed herein to the bill of complaint be and the same is hereby overruled, and rule on the defendants to answer within twenty days from this date.

Afterwards to wit: on the sixth day of March, 1897, there was filed in the clerk's office of said court a certain opinion delivered orally by Judge Grosscup, which said opinion is in the words and figures following, to wit:

Opinion by Judge Grosscup. Filed March 6, 1897.

Opinion.

Circuit Court of the United States, Northern District of Illinois.

HENRY CLEWS ET AL.
vs.
MALCOLM JAMIESON ET AL. } 24261.

MARCH 1, 1897.

GROSSCUP, *J.* (orally):

This is a demurrer to the bill on the ground that the bill does not show a cause cognizable in equity. The bill shows that the plaintiffs sold on the Chicago stock exchange to the defendants, in accordance with the rules and customs of the exchange, 700 shares of the capital stock of the Diamond Match Company, one of the stocks listed on the stock exchange; that the purchase price of the stock was $222 per share, and that the plaintiffs, through their brokers, tendered to the defendants thereafter certificates for the 700 shares of such stock, duly endorsed and transferred, to invest the defendants with title thereto, and on their part, to then and there carry out the contract. But that the defendants refused
28 this tender and refused to carry out their contract of purchase. That, thereafter, agreeably to the rules of the stock exchange, these 700 shares of stock were put up at public auction and were sold, without having been advertised, in the manner best calculated to bring the sale to the attention of the public purchasing that character of securities, for $130 per share, and that this $130 per share was the then fair market value of the stock; that the difference between the contract price and the price procured for such certificates at that sale was in the neighborhood of $6,500, which is the amount of damage suffered by the plaintiffs on account of the defendants' failure to abide by their contract.

The bill then alleges that, under the rules of the stock exchange, the defendants at the time of the contract of purchase, and also the plaintiffs at the same time, deposited with the stock exchange, the sum of $7,000 in trust, as security for the faithful performance on their part of the contract, and that this sum of $7,000 is now in the hands of the committee, or of the stock exchange, subject to the order of the committee. The bill charges that one, at least, of these defendants is a member of that committee, and that the committee refused to deliver to the plaintiffs this sum of $7,000 on account of the damage they have suffered on account of the contract price of the sale of such stock.

The bill then asks that this committee and the defendant Jamieson be required to pay over this sum of $7,000. The bill proceeds entirely upon the theory that the fund in the hands of the committee of the stock exchange is a trust fund and therefore that its disposition is subject to the decrees of the court sitting in equity.

I must presume upon a consideration of the demurrer to this bill—the demurrer admitting all the facts of the bill—that the

transaction between the plaintiffs and the defendants was a lawful one; in other words, that the parties to this contract intended in good faith to purchase and to sell in pursuance thereof, to deliver and to accept the certificates of stock in question, and that it was not in any respect tainted with gambling.

My attention on the argument was called to the rules of the stock exchange, but except as those rules are set out in the bill they are not properly before the court, for the consideration of this case is solely upon the averments of the bill.

In view of that I have concluded that the bill *prima facie* sets out a sufficient cause to require an answer, and I will, therefore, over-rule the demurrer.

(Endorsed:) Filed March 6, 1896. S. W. Burnham, clerk.

29 Afterwards, to wit: on the first day of April, 1897, came E. G. Foreman, Charles Henrotin *et al.* and by their solicitors filed in the clerk's office of said court their answer to the bill of complaint, which said answer is in the words and figures following, to wit:

Answer of Foreman, Henrotin, et al. Filed April 1, 1897.

Answer.

UNITED STATES OF AMERICA, *Northern District of Ill.*, } *ss:*

In the Circuit Court Thereof.

HENRY CLEWS ET AL. *vs.* JAMIESON ET AL. } 24261. In Chancery.

The answer of E. G. Foreman, Charles Henrotin, A. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, Henry C. Hackney, H. Herbst, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William V. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. C. Wasmansdorff, George A. McClellan, and A. L. Dewar, certain of the defendants, to the bill of complaint of Henry Clews *et al.*, complainants.

These defendants, now and at all times hereafter saving to themselves all manner of benefit and advantage of exception which can be had or taken to the many errors, uncertainties and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as these defendants are advised it is material or necessary for them to make answer thereunto, say:

These defendants admit that the Chicago stock exchange was formed for the purpose of opening an exchange where its members could meet together to buy and sell stocks and securities listed with said exchange, and where its members could make contracts for

said sales and purchases under the rules and customs of said exchange; that in the month of July, 1896, they, together with Malcolm M. Jamieson, constituted the governing committee of the said Chicago stock exchange.

These defendants further admit that on or about August 3, 1896, said Schwartz, Dupee & Company, deposited with the clearing-house of said stock exchange the sum of seven thousand dollars in trust as security for the faithful performance of a certain contract for the sale of seven hundred shares of the capital stock of
30 the Diamond Match Company to Jamieson & Company, and that said Jamieson & Company also deposited with said clearing-house of said stock exchange the sum of seven thousand dollars to be held by said stock exchange in trust to secure the faithful performance on the part of said Jamieson & Company of their contract to purchase said stock and to pay for the same; that said sums are now in the possession of these defendants as the governing committee of said stock exchange; that both said Schwartz, Dupee & Company, and said Jamieson & Company are members of said stock exchange, and deposited said sums under the constitution and by-laws of the said stock exchange, a copy of which constitution and by-laws is hereto attached marked "Exhibit A," and made a part of this answer.

These defendants further answering, say: That they are ignorant as to the truth or falsity of all the other matters and things in said bill set forth, and leave the said complainants to the strict proof of said facts.

These defendants, further answering, deny that the complainant is entitled to the relief, or any part thereof, in the said bill of complaint demanded, and pray the same advantage of this answer as if they had pleaded or demurred to said bill of complaint, and pray to be dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

CHESTER M. DAWES,
Solicitor for Above-named Defendants.

Chicago, March 31, 1897.

(Endorsed:) Filed April 1, 1897. S. W. Burnham, clerk.

Afterwards, to wit: on the sixth day of April, 1897, came the complainants in said entitled cause by their solicitors and filed in the clerk's office of said court their replication to the answer of E. G. Foreman *et al.*, which said replication is in the words and figures following, to wit:

Replication. Filed April 6, 1897.

31 Replication.

Circuit Court of the United States, Northern District of Illinois, Northern Division.

HENRY CLEWS ET AL.
vs.
JAMIESON ET AL. } 24261.

The replication of Henry Clews, Charles M. Foster, and James B. Clews, complainants, to the joint answer of E. G. Foreman, Charles Henrotin, A. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, Henry C. Hackney, H. Herbst, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William V. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. C. Wasmansdorff, George A. McClellan, and A. L. Dewar, defendants.

These repliants saving and reserving to themselves now, and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer of the said defendants, for replication thereunto, say that they will aver, maintain and prove their bill of complaint to be true, certain and sufficient in the law, to be answered unto; and, that the answer of the said defendants is uncertain, untrue and insufficient to be replied unto by these repliants, without this; that any other matter or thing whatsoever, in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed, or denied, is true. All which matters and things these repliants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray, as in and by their said bill they have already prayed.

ESTABROOK & DAVIS,
Solicitors for Complainants.

(Endorsed:) Filed April 6, 1897. S. W. Burnham, clerk.

32 Afterwards, to wit: on the fourth day of May, 1897, in the December term of said court, 1896, in the record of proceedings thereof in said entitled cause before the Hon. John W. Showalter, circuit judge, appears the following entry to wit:

Order of Reference.

Order of May 4, 1897.

HENRY CLEWS ET AL.
vs.
MALCOLM M. JAMIESON ET AL. } 24261. In Chancery.

Now come the parties by their solicitors on motion of complainants. It is ordered by the court that this cause be referred to Elijah B. Sherman, Esq., one of the masters in chancery of this court to take proofs and report the same with his conclusions thereon.

Afterwards, to wit: on the 22nd day of January, 1898, there was filed in the office of the clerk of said court a report of the master in chancery, Elijah B. Sherman, of his conclusions, which said report is in words and figures following, to wit:

Master's Report. Filed Jan. 22, 1898.

Master's report of findings of fact and of law.

Circuit Court of the United States, Northern District of Illinois, Northern Division.

HENRY CLEWS, CHARLES M. FOSTER, and JAMES B. CLEWS
vs.
MALCOLM M. JAMIESON, ROLAND C. NICKERSON, HARRY F. Billings, Edwin G. Foreman, Charles Henrotin, A. W. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, H. Herbst, Henry C. Hackney, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William N. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, George A. McClellan, A. L. Dewar, Gustavus A. Schwartz, John Dupee, John W. Conley, and Isaac J. Bloom, of Chicago, Illinois. } 24261.

To the judges of said court:

The undersigned, master in chancery of said court, to whom by an order entered therein on the 4th day of May, 1897, the
33 above-entitled cause was referred to take proofs and report the same to the court, with his conclusions thereon, respectfully reports:

That said cause was set down for hearing before the undersigned, as such master, for the purposes in said order of reference specified on the 8th day of June, 1897; there appeared Estabrook & Davis, solicitors for complainants, and Mr. S. P. McConnell, of the firm of Tenney, McConnell & Coffeen, solicitors for defendants; that testimony was taken on behalf of the respective parties on that day, and

divers days thereafter, to which said hearing was from time to time adjourned; which, together with the exhibits therein referred to is made a part hereof and is herewith returned into court; that having considered the pleadings in said cause, and the evidence so taken as aforesaid, and having heard arguments of counsel, the master finds as follows:

Provisions and By-laws, Chicago Stock Exchange.

Findings of fact.

I.

That since the year 1882, there has existed and now exists in the city of Chicago, a voluntary association, known as the Chicago stock exchange, composed of brokers having places of business in the vicinity of said exchange in the city of Chicago, who, on due application and recommendation and posting, are elected to membership by the governing committee, consisting of the president of the exchange, and twenty-four members, which governing committee is elected by a ballot at the annual meeting in each year; that the whole government of the exchange is vested in said governing committee, the president of said exchange being also its president, and being charged with the duty of seeing that the provisions of the constitution and by-laws thereof are enforced; that every member is required to sign the constitution and by-laws of said exchange, or assent thereto in writing and pledge himself to abide thereby, and by all rules theretofore or thereafter to be adopted; that the constitution, by-laws and rules of said exchange in force during the last half of the year 1896 contained, among other things, the following provisions:

ARTICLE I.

Title of the Association.

The title of this association shall be "The Chicago stock exchange."

34 ARTICLE II.

Government of the Exchange.

The whole government of the exchange shall be vested in a governing committee composed of the president and twenty-four members, elected in the manner hereinafter provided.

ARTICLE VI.

Duties of President and Vice-President.

It shall be the duty of the president to see that the several provisions of the constitution and by-laws are enforced, and to have a general care of the interests of the exchange. He may preside over the exchange whenever he may elect to do so, and he shall be president of the governing committee.

* * * * * * *

ARTICLE XIII.

Place of Business—Partnership and Dissolutions.

SECTION 1. Every member must have in the vicinity of the exchange a place of business other than the exchange, where comparisons may be made at any time during the day after the expiration of one hour from the time of the transaction, and where notices may be served; and it shall be the duty of every member to keep filed with the secretary a written notice designating such place of business, and similarly to give notice of any change thereof. Any member neglecting to comply with this rule may be considered in default of his contracts, and such contracts may be closed out according to article XVII of the by-laws.

* * * * * * *

ARTICLE XV.

Suspended Members—Readmission—Claims of Creditors, etc.

SECTION 1. Any member who fails to comply with his contracts, or who becomes insolvent, shall be suspended until he has settled with his creditors. Such members shall immediately inform the president in writing that he is unable to meet his engagements, and it shall be the duty of the presiding officer, thereupon, to give notice from the chair of the suspension of such member. The secretary shall record the failure of such member in a book kept for
35 that purpose. In default of giving such information, the party, in application for readmission, shall not be entitled to a reference of his case to the committee on admission, unless two-thirds of the governing committee present shall vote in favor of such reference.

* * * * * * *

ARTICLE XVII.

Fictitious Sales, Bids, and Offers.

SECTION 1. No fictitious sales shall be made. Any member contravening this section shall, upon conviction, be suspended by the governing committee.

SEC. 2. Any member who shall make fictitious or trifling bids or offers, or who shall offer to buy or sell any stock or security other than Government bonds, at a less variation than one-eighth of one per cent. shall, upon conviction, be subject to suspension, or such other penalty as the governing committee shall impose.

ARTICLE XVIII.

Payment and Deliveries in Certain Cases to be Simultaneous.

In all deliveries of stocks, bonds, etc., the party delivering shall have the right to require the purchase-money to be paid at the time and place of delivery.

* * * * * * *

ARTICLE XXIX.

Any member of this exchange who is interested in, or associated with, or whose office is connected directly or indirectly by wire or other method or contrivance, with any organization, firm or individual engaged in the business of dealing in differences or quotations on the fluctuations in the market price of any commodity or security without a *bona fide* purchase or sale of said commodity or security in a regular market or exchange shall, on conviction thereof, be deemed to have committed an act or acts detrimental to the interest and welfare of the exchange.

36 BY-LAWS.

ARTICLE I.

Hours of Business.

SECTION 1. The exchange shall be open for the transaction of business upon every business day from 10 a. m. until 2 o'clock p. m.

* * * * * * *

ARTICLE IV.

No sale of securities shall be made on which a deposit shall be offered as the limit of liability.

Any member guilty of dealing, or offering to deal, with a person not a member, in the rooms of the exchange, shall be fined fifty dollars, without excuse or appeal, and for a repetition of the offense, shall be suspended for a term not exceeding sixty days.

* * * * * * *

ARTICLE VII.

Hour for the Delivery of Securities—Payments.

SECTION 1. All deliveries of securities must be made between 11 a. m. and 1.30 o'clock p. m., or the buyer may demand that they shall lie over until the next day without interest, when they shall be delivered before 10.30 o'clock a. m., and when deliveries are not made by that time the contract may be closed under the rule after due notice to the defaulting party as provided in article XVII of the by-laws. Such notice must be given, however, not later than 10.45 o'clock a. m., and the contract must be closed without delay unless the time for so doing be extended by mutual consent. In all cases certified checks on national or State banks must be given in payment of all securities delivered.

In the absence of any notice or agreement, the contract shall continue without interest until the following day, when the same rule shall apply. In every case of non-delivery, however, the party in default shall be liable, in addition for the damages that may accrue.

SEC. 3. This rule shall apply to borrowed or loaned securities. When a sale has been made for cash after 1 o'clock p. m. the seller shall have until 2 p. m. to make his delivery.

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ARTICLE XVI.

Mutual Deposits on Contracts.

SECTION 1. In any contract either party may call at any time during the continuance of the same for a deposit of ten dollars per share upon the par value of the securities bought and sold; and whenever the market price of the securities shall change so as to reduce the margin of said deposit, either way below the ten dollars, either party may call for a deposit sufficient to restore the margin to ten dollars, and this may be repeated as often as the margin may be so reduced. In all cases where deposits are called they shall be made within one banking hour from the time of such call.

SEC. 2. In case either party shall fail to comply with the demand for a deposit in accordance with the provisions of this article, the party calling, after having given due notice, may repors the default to an officer of the exchange, who shall repurchase or resell the security forthwith in the exchange, and any difference that may accrue shall be paid over to the party entitled thereto. The notice above referred to shall be either personal or shall be left in writing at the office of the party to be notified, or in case he has no office, then by public announcement whenever the exchange may be in session.

* * * * * * *

ARTICLE XVII.

Default—Closing Contracts under the Rule.

Should any member neglect to fulfill his contract on the day it becomes due, the party or parties contracting with him shall, after giving notice as required by section 2 of the preceding article, employ an officer of the board to close the same forthwith in the exchange by purchase or sale as the case may require, unless the price of settlement has been agreed upon by the contracting parties. In case of a failure of a creditor to close the contract as above, the price shall be fixed by the price current at the time such contract ought to have been closed under the rule. In all cases where an officer may be directed to buy or sell securities under this rule, the name of the member defaulting, as well as that of the member giving the order, shall be announced. No order for the purchase or sale of securities under this rule shall be executed unless made out in writing over the signature of the party giving the order, who shall state the reason therefor; and it shall be the duty of the officer who executes the order to endorse thereon the name of the

38 purchaser or seller, the price and the hour at which the contract is closed, and hand the same to the secretary of the board, who shall within twenty-four hours ascertain whether the party for whose account the order was given has paid the difference, if any, arising from the transaction; if not, the secretary shall report the default to the president. The duty devolved upon the officers of the exchange under this rule shall be performed without charge. No party shall be permitted to supply offers to buy or sell

securities closed for his account under the rule; and when a contract is closed under this rule, any action of the defaulter, direct or indirect, by which the prompt fulfillment of such contract is delayed, hindered or evaded, to the detriment of the other contracting party, shall subject the offending party to suspension for not less than thirty days in the discretion of the governing committee, by a vote of two-thirds of the members present at the meeting. When contracts are closed out under the rule, any member supplying the bid or offer, and not duly receiving or delivering the stock, as the case may be, renders himself liable to prosecution under this article. Should any stock thus sold not be delivered until the next day, the contract shall continue, but the defaulting party shall not be liable to pay such damage as may be assessed by the arbitration committee. The same rules as to notice, time and places that govern defaults in other contracts shall apply to borrowed securities, which on non-delivery or receipt, must be borrowed or loaned in open market, except in case of actual default in receiving or delivering after notice to close the loan; then the same are to be bought or sold, as the case may be, for account of the defaulter in the manner provided in this article.

* * * * * * *

ARTICLE XXVIII.

No person other than a member shall have a right to file any claim against any member of the exchange.

Clearing-house Rules.

SECTION 1. Under the following regulations transactions may be made for "the account" in any securities listed for that purpose dealt in at the exchange.

SEC. 2. Deliveries of cash, stock or transactions for "the account" shall be made on the last day of each month. Provided, however, should the last day of any month occur on a holiday, or on a day when the exchange is closed for business, then in that case deliveries shall be made on the first business day preceding.

SEC. 3. All purchases and sales "for the account" shall be
39 entered upon the blanks furnished by the manager sealed for that purpose, and said blanks properly filled out, balanced, accompanied by a proof-sheet, and signed, must be delivered to said manager before 9.45 a. m. It shall be the duty of the manager to compare and examine the statements rendered, and to report, should any errors be found, to the parties making such errors before 12 m., by written notice, which must be called for at the manager's office. Parties in error must at once proceed to adjust the same and correct their statements. All balances due from members as shown by the statements shall be paid by certified check drawn to the order of the bank design-ed for that purpose, and delivered to the manager before 10.15 a. m., the same day, except on Saturdays, when the balance must be paid before 9.45 a. m.

SEC. 4. On balances due to members, as shown by the statements,

a draft for the amount, payable to their own order, shall be drawn upon the bank designated for that purpose and delivered to the manager before 10.20 a. m. (except on Saturday). The manager shall cause said draft, if correct, to be accepted by said bank, and returned to the parties entitled thereto at the manager's office.

SEC. 5. *On* or before 9.45 a. m., parties who have not borrowed or loaned their stock balances for "the account" shall extend said balances on their statements at the closing bid price, designated as short or long, and shall request the manager in writing to borrow or loan said stock balances for their account and risk at the closing bid price. Notice that such loans have been made and the names of the parties thereto will be delivered at the manager's office on or before 2 p. m. Loans made by the manager are for one day only, unless renewed between members.

SEC. 6. Stock balances as shown by the statements rendered for cash settling days must be delivered and paid for at the closing bid price of the previous day, as per manager's notices, before 1.30 p. m. Provided, however, if satisfactory evidence is shown the clearing-house committee that the cash stock is on hand in New York, or in transit for Chicago, three days' grace will be given the seller to make the delivery with interest, failing in which the clearing-house committee shall cause to be purchased for account of delinquent said stock in whichever market in their judgment seems best; and the party so failing to deliver shall be held responsible for all loss or damage arising therefrom, but when a failure to receive or deliver occurs, nothing in these notifications shall be construed to relieve the last contracting parties to the transaction from the liabilities to each other.

SEC. 7. Whenever a member fails to pay the balance due on his statement by 10.15 a. m. (except on Saturday), the manager shall notify the presiding officer of the exchange, whose duty it shall be to forthwith cause the stock balance, as shown by the statement of the delinquent, to be bought in or sold out under the rules, as the case may be, and assess the party in interest on the statement *pro rata*. In case any member owes an additional amount caused by errors, disputes or assessments, said amount shall be paid within one hour from the time of notification of the same, otherwise the party will be considered as having failed, and be treated accordingly.

SEC. 8. Whenever a member is unable to meet his contracts or transactions made for "the account," he shall make a statement of his transactions, to be audited that day, and deliver it to the manager or presiding officer of the exchange.

SEC. 9. The manager, or any assistants employed by him in the manager's office, are positively prohibited from receiving any securities or currency or any other evidences of value, except the checks and drafts hereinbefore mentioned in these rules.

SEC. 10. The same rules as to notice, time and place that govern defaults in other contracts shall apply to transactions for "the account."

SEC. 11. Neither the exchange nor any of its members (except

those making the errors), the manager or any assistants employed by him, shall be responsible for any errors made in the statements to the manager, but the errors must be settled and adjusted at once between the members making said errors when notified by the manager to do so. The manager shall report any neglect or refusal to comply with these rules to the presiding officer of the exchange.

SEC. 12. The margin to be deposited on stocks trading in clearing-house selling at $100 or over per share shall be $10 per share, and on all stocks selling under $100 per share the margin shall be $5 per share.

SEC. 13. Margins deposited on trades in the clearing-house shall be considered as a margin or as a part of same under section 1 of article XVI of the by-laws of the stock exchange. All such margins to be deposited in the clearing-house.

SEC. 14. The clearing of trades and money is not completed until the trades and substitutions are all made and notice posted to that effect by the manager of the clearing-house.

SEC. 15. The broker- have the party they may trade with or party received from the clearing-house on the substitution of the day before, in case of any failures between the hours the sheets are put in the clearing-house, 9.45 a. m., and the time the notice is posted that the substitutions are ready for that day.

SEC. 16. In the event of the announcement of the failure of any member to meet his contract, all stock bought in on or sold
41 out for him as "account" stock shall be settled outside of the clearing-house, and only such stocks as appear on the substitution sheet of the day of the failure shall be allowed to clear on the clearing-house sheet of the following morning.

SEC. 17. When any member fails to execute any contracts required of him by the clearing-house, the margin checks deposited by such member for the protection of other members contracting with him through the clearing-house, shall be held first for that special purpose, and after satisfying the claims of such members to the extent of the margin rule of the clearing-house, the balance, if any, shall be held for a period not exceeding ten days, as a trust fund for a *pro rata* distribution among other creditors, who are members of the Chicago stock exchange.

II.

That such rules and by-laws being in force, complainants, on the 16th day of July, 1896, wired their brokers, Schwartz, Dupee & Company, as follows:

"Sell 500 Diamond Match at 220½ for account;" which was done; that later on the same day, said brokers wired complainants as follows:

"Sold 500 Diamond Match at 221⅛ for the account."

That on the 20th day of July, 1896, said brokers received telegram from complainants as follows:

"Sell 200 Diamond Match at 221 for the account at opening of market."

That later on the same day, said brokers wired complainants as follows:

"Sold 200 Diamond Match 221½ for the account."

That on the 25th day of July, 1896, complainants wired said brokers, as follows:

"Change the Diamond Match over to August account at 2½ %. If you cannot do it let us know at once."

That shortly after, on the same day, complainants wired said brokers, as follows:

"You sent us the difference this morning at 2½; at what difference can you do it now?"

That later, on the same day, complainants wired said brokers as follows:

"Change the 500 at 2 cents or better."

That afterwards, and about 12 o'clock on the same day, said brokers wired complainants as follows:

"Bought Diamond Match 227 for the account; sold 500, 229 account 2d."

42 That on July 27th, complainants wired said brokers, as follows:

"Change 200 more Diamond Match 2 % or better."

Later, on the same day, said brokers wired complainant- as follows:

"We changed the 200 Match at 2¼ difference. Will give you price later."

And, shortly afterwards, on the same day, said brokers wired complainant- as follows:

"Bought 200 Match 226¾, account; sold 200 second account 229."

That these purchases on July account balanced the sales on July account and left the brokers with sales made for complainants of 700 shares of the stock of the Diamond Match Company for the August account; that on the 3d day of August the clearing department of said stock exchange sent to Schwartz, Dupee & Company, and Jamieson & Company, clearing-house sheets, as follows:

"CHICAGO STOCK EXCHANGE,
CLEARING DEPARTMENT,
CHICAGO, *August 3d*, 1896.

Schwartz, D. & Co.:

We have settled all trades on your sheet this day with the following exceptions, which have been substituted:

Bought.	Sold.	Stock.	Price.	Substitution.
	50	W. Ch'go.	103¾	Wilson & S.
	150	"	103¾	Wasmansdorff.
	1,150 Match.		222	Jamieson & Co.
	100 Bisc.		22	Breeze & Co.
	550 "		92	Spencer.

CHICAGO STOCK EXCHANGE,
CLEARING DEPARTMENT,
CHICAGO, *August* 3, '96.

Jamieson:

We have settled all trades on your sheet this day with the following exceptions which have been substituted:

Bought.	Sold.	Stock.	Price.	Substitution.
1,150	....	M.	222	Schwartz."

That the item "1,150 Match 222, Jamieson & Co.," was made up in part of the 700 shares sold by Schwartz, Dupee & Company, on August account for complainant; that this substitution of Jamieson & Company for the parties to whom such 700 shares had been originally sold was done by the clearing department of said exchange, according to its uniform custom.

43 III.

That the method of doing business on said exchange is as follows: At ten o'clock there is an official call at which the secretary and manager call all the stocks, bonds and securities on the official printed list, and as this call progresses, any member wishing to buy or sell, bids thereon, and the record is made of the transaction; after which there is an irregular call, which closes at half past one, when the manager of the clearing-house announces the clearing-house or settlement price for the day, which are the closing prices on the exchange for the respective stocks and securities; that the manager then substitutes trades and sends out cards to all buying or selling on account for the current month, or for the next month; that on the 25th of the month and thereafter until the second day before the end of the month, two calls are made, one for the current month, and one for the next ensuing month, and this is done to allow those who wish to do so to change their accounts over to the next month. That this substitution was made by the clearing department by a system somewhat similar to that employed by the clearing-house for banks, that is, that where a broker has purchased and sold during the day the same amount of the same kind of stocks or bonds, his account is balanced by the clearing department, and all margins deposited by such broker may be withdrawn; that when sales and purchases are made by different brokers, one buying and the other selling, the same kind of stock or bonds, a substitution is made by the manager of the clearing department, by which it appears that the broker selling has sold such stock, not to the person to whom it was originally sold, but to a person or persons other than those to whom such sales were originally made, and who originally bought of some one else, and that a broker purchasing stock has purchased from some broker other than the broker from whom he originally purchased the same; for instance, if A had sold 100 shares of stock to X, and B has bought the same amount of the same stock from Y, and X and Y's accounts are balanced by other transactions, the substitution would make it appear that A had sold

100 shares to B, and B had bought 100 shares from A, and the names of the parties with whom the original transactions had actually been made by A and B would not appear on the clearing-house sheet; that in the transactions on said exchange it is then customary for the parties thus substituted and brought into the relation of buyer and seller with each other by the manager, to assent to the new relations thus formed, and to confirm the transactions as thus adjusted by the manager, and to put up the margins
44 required by the rules, unless margins are already on deposit in the exchange, in which case they are transferred by the manager to the new account.

IV.

That being advised of the substitution on account, as aforesaid, said Schwartz, Dupee and Company, and said Jamieson and Company on said 3d day of August, 1896, exchanged trading cards with each other, on which appears the following:

"CHICAGO, *Aug.* 3, 1896.

M. Jamieson & Co.:

We hereby confirm sales made by us for the account today under the rules of the Chicago stock exchange, also substitution trades.

Am't.	Kind of property.	Price.
	Substitution trades—Sold.	
1,150	Match	222
	Difference { Collect	
	Pay	287 50

(Signed) SCHWARTZ, D. & CO."

"CHICAGO, *Aug.* 3, 1896.

M. Schwartz:

We hereby confirm purchases made by us for the account today, under the rules of the Chicago stock exchange, also substitution trades.

Am't.	Kind of property.	Price.
	Substitution trades—Bought.	
1,150	D. Match	222
	Difference { Collect	
	Pay	287.50

(Signed) JAMIESON & CO."

That these cards were handed by the parties receiving them to the clearing-house department, so that it appeared at the close of business on said 3d day of August, by the clearing sheet, that chwartz, Dupee & Company had sold to Jamieson & Company on account, for August, 1,150 shares of the stock of the Diamond Match

Company, 700 shares of which are the stock in controversy
45 in this case, delivery of which under rule 2 of the clearing-house was to be made on the last day of August, 1896; that Schwartz, Dupee & Company and Jamieson & Company each deposited with the said clearing-house, seven thousand dollars, as margins on said 700 shares of stock, which amount is still held by the said stock exchange, in trust.

V.

That on the 3rd day of August, 1896, the governing committee, of which defendant Jamieson was then *ex officio* president, by virtue of his being then president of said exchange, held a meeting at which the following resolution was adopted, the said defendant, Jamieson, voting in favor of its adoption.

"Resolved, That the exchange adjourn on Tuesday morning, the 4th instant, and remain closed pending further action by this committee."

That pursuant to said action, said exchange did not open on said August 4th, or thereafter, until the 5th day of November, 1896.

VI.

That on the 31st day of August, 1896, Schwartz, Dupee and Company tendered to Jamieson and Company ten certificates of the stock of the Diamond Match Company for one hundred shares each, and three like certificates for 50 shares each, making 1,150 shares of said stock, which said Jamieson & Company examined and refused to receive.

VII.

That on the 11th day of September, 1896, Schwartz, Dupee & Company, delivered to Jamieson & Company, the following letter:

"CHICAGO, *September* 9, 1896.

Messrs. Jamieson & Co., No. 187 Dearborn street, Chicago, Illinois.

DEAR SIRS: On August 31, 1896, we tendered you seven hundred (700) shares of Diamond Match stock in settlement of sales made by us. The sales made were 500 shares July 25th, and 200 shares July 27th, 1896, you being substituted through the clearing-house of the Chicago stock exchange August 3, 1896, as the purchaser of said stock.

This is to notify you that said sales were made by us as agents for Henry Clews & Co., of New York, who may rightfully
46 take any proceedings to enforce the contracts for said sales, and who are authorized to make settlement therefor.

Very truly yours, SCHWARTZ, DUPEE & CO."

That on the same day, the following letter was delivered by Mr. Davis to Jamieson & Company:

"SEPTEMBER 10, 1896.

Messrs. Jamieson & Company, # 187 Dearborn street, Chicago.

DEAR SIRS: This is to notify you that on Tuesday, the 15th day of September, 1896, at one o'clock p. m., we shall offer for sale, at public auction, to the highest bidder for cash, at the judicial sales-rooms of the Chicago real-estate board, No. 57 Dearborn street, in the city of Chicago, county of Cook and State of Illinois, seven hundred (700) shares of stock of the Diamond Match Company, and at said times and place will sell the same to the highest bidder for cash. Said sale will be made for your benefit on account of your contracts with Schwartz, Dupee & Co. on the Chicago stock exchange for the purchase by you of said shares, in which contracts the said Schwartz, Dupee & Co. were acting as agents of the undersigned; said shares of stock having been tendered you by Schwartz, Dupee & Company in fulfillment of said contracts on the 31st day of August, 1896.

You are further notified that should said stock at said sale sell for less than the amount due from you on said contracts we will look to you to settle the difference, and we will hold you responsible for any loss on account of said contracts.

The contracts of sale referred to herein are the same mentioned in the letter of Schwartz, Dupee & Company accompanying this notice.

In the meantime we hold said stock ready for delivery to you upon payment of the amount due from you under said contracts of purchase.

Very truly yours, HENRY CLEWS & CO.,
By ESTABROOK & DAVIS,
Their Att'ys."

That on the 23rd day of September, 1896, about 9.45 a. m., the following letter was delivered by Mr. Davis to Jamieson & Company:

"SEPTEMBER 22, 1896.

Messrs. Jamieson & Company, Chicago, Illinois.

DEAR SIR-: Pursuant to our notice to you dated the 10th inst., which we personally left with Mr. Billings on the 11th, we have to inform you that on the 15th day of September we adjourned
47 the auction sale of the seven hundred (700) shares of stock of the Diamond Match Company until the 22nd day of September, 1896, at one o'clock p. m.

We sent out several hundred circulars to persons interested, and to such persons as we might reasonably suppose were interested, both of the original date fixed for the sale, and of the date to which the sale was adjourned.

We today offered the stock for sale to the highest bidder, and it was struck off at the price of one hundred and thirty dollars ($130) per share. The shares offered were the same ones tendered you by Schwartz, Dupee & Company on the 31st of August, as stated in their letter of the 9th inst.

This is to further notify you that we shall hold you liable for

the difference between the price at which you purchased and the price for which the stock sold at auction, and for all damages which we have sustained by reason of your failure to accept and pay for said stock.

Very truly yours, HENRY CLEWS & CO.,
By ESTABROOK & DAVIS."

That on the 24th day of September, 1896, at 9.50 a. m., the following letters were delivered to Jamieson & Company by Mr. Davis:

"SEPTEMBER 23, 1896.

Messrs. Jamieson & Company, # 187 Dearborn street, Chicago, Illinois.

DEAR SIRS: As the Chicago stock exchange has closed and it is uncertain when it will be opened, we have to request that you consent that the Chicago stock exchange pay to us the margins deposited on account of the sale of seven hundred (700) shares of the stock of the Diamond Match Company sold by us for Henry Clews & Company and purchased by you, according to the clearing-house sheet of August 3rd.

Upon receipt of the margins from the clearing-house, the amount deposited by you, to wit: ten dollars per share, will be credited you on account of said purchase; without prejudice, of course, to the right of Henry Clews & Company to demand and recover from you any damages sustained by reason of your failure to accept and pay for said stock over and above the amount deposited by you to protect said sale.

Yours truly, SCHWARTZ, DUPEE & CO.

We concur in the above request, and upon receipt of said
48 deposit by Schwartz, Dupee & Company, Jamieson & Company will be credited with the amount of the deposit of Jamieson & Company. We shall look, however, to Jamieson & Company to settle any damages over and above the amount of said credits.

HENRY CLEWS & CO.,
By ESTABROOK & DAVIS,
Their Att'ys."

That on the said 24th day of September, Schwartz, Dupee & Company received from Jamieson & Company the following letter:

"Jamieson & Co., bankers and brokers, 187 & 189 Dearborn St.

Members New York stock exchange, Chicago stock exchange, Chicago board of trade.

CHICAGO, *Sept.* 24, 1896.

Schwartz, Dupee & Co., city.

GENTLEMEN: We have your letter of Sept. 23rd. We have noted your suggestion thereon, but as matters stand, we do not think any affirmative action is required on our part.

Yours truly, JAMIESON & CO."

That on the same day, Mr. Davis delivered to Mr. Joseph R. Wilkins, secretary of said exchange, the following letter:

"SEPTEMBER 23, 1896.

To the Chicago stock exchange and its governing committee, Chicago.

DEAR SIRS: There is on deposit in the exchange, twenty dollars ($20) per share on seven hundred (700) shares of the Diamond Match Company stock sold by us to Jamieson & Company for the August account; of this amount ten dollars ($10) per share was deposited by us, and ten dollars ($10) per share by Jamieson & Company to protect said contracts.

A tender of the stock was made by us to Jamieson & Company, at their office, on the 31st day of August, 1896, before 1.30 p. m., as required by the rules. Jamieson & Company refused to accept the stock, and we now demand a payment to us of the amount of said deposits. Our clients on the transactions were Henry Clews & Company, and this demand is made on their behalf; without prejudice to their right to recover from Jamieson & Company any damages on account of the latter's default.

49

Very truly yours, SCHWARTZ, DUPEE & CO.

We concur in the above request.

HENRY CLEWS & CO.,
By ESTABROOK & DAVIS."

That no reply was received to this letter.

That three or four days before the said 15th day of September, the following notice was sent to every broker then a member of said exchange, and to every banker in the city of Chicago, and was also inserted for three days in the "Chicago Daily Bulletin," a legal paper, and having a general circulation among bankers and brokers and lawyers in the city of Chicago.

"Estabrook & Davis, # 807 Chamber of Commerce building.

Sale of Diamond Match Stock.

Notice is hereby given that on Tuesday, the 15th day of September, 1896, at one o'clock p. m., at the judicial salesrooms of the Chicago real-estate board, No. 57 Dearborn street, in the city of Chicago, county of Cook and State of Illinois, the undersigned will offer for sale, and sell, at auction, to the highest bidder for cash, seven hundred (700) shares of the capital stock of the Diamond Match Company.

HENRY CLEWS & CO.,
By ESTABROOK & DAVIS,
Their Attorneys."

That all the daily newspapers in the city of Chicago also had notice of said sale; that on the said 15th day of September, at the appointed hour, Mr. Davis, of the said firm of Estabrook & Davis, attended at the place of sale and found present about one hundred

stock brokers, who seemed to be interested in the said sale; that thereupon Mr. Davis adjourned said sale until September 22, at 1 o'clock p. m. and made public announcement of such adjournment; that such adjournment was also noticed in all the Chicago daily papers; that on the morning of the 21st day of September, Mr. Davis mailed to all the bankers and stock brokers in Chicago the following notice:

"Estabrook & Davis, No. 907 Chamber of Commerce building.

Sale of Diamond Match Company Stock.

Notice is hereby given that the auction sale advertised for Tuesday, the 15th day of September, 1896, at one o'clock p. m., at the judicial salesrooms of the Chicago real-estate board, No. 57 Dearborn St., in the city of Chicago, county of Cook and State of Illinois, for the sale of seven hundred (700) shares of the capital stock of the Diamond Match Company, was adjourned until Tuesday, Sept. 22, 1896, at one o'clock p. m., at which time and at the same place said stock will be sold to the highest bidder for cash.

HENRY CLEWS & CO.,
By ESTABROOK & DAVIS,
Their Attorneys."

That on said 22nd day of September, Mr. Davis attended at the hour and place named, and offered for sale certificates for 700 shares of the stock of the Diamond Match Company; nearly one hundred people being there present; that bids started at less than par, were raised until Mr. Frank N. Gage, a stock broker, bid 130 per share for said 700 shares; that Mr. Barber, the president of the Diamond Match Company, bid $135 per share for 200 shares thereof; that Mr. Davis refused to accept a bid for less than the entire 700 shares, unless there was also a bid for the residue of said stock so that the total amount of the bids for separate lots would aggregate more than the bid of $130 per share for the 700 shares; that no other bids were received for the whole amount of stock; that after repeated warnings that the stock would be struck off and sold to Mr. Gage at the bid of $130 per share, unless there were other bidders, it was declared sold to Mr. Gage at $130 per share, and an order was given by Mr. Davis on Schwartz, Dupee & Company to deliver the stock to Mr. Gage upon payment of the amount bid.

IX.

That it is admitted of record by counsel for complainants that at the time complainants gave the several orders to Schwartz, Dupee & Company to sell on the Chicago stock exchange the various amounts of Diamond Match Company stock, and at the time said Schwartz, Dupee & Company executed said orders, said Schwartz, Dupee & Company did not have in their hands any stock of said Diamond Match Company which was the property of the complainants, nor did said Schwartz, Dupee & Company at any time there-

after have in their hands any of the stock of said Diamond Match Company, which was the property of complainants.

It is admitted by the complainants that the 1,150 shares of the capital stock of the Diamond Match Company tendered to Jamieson & Company, by Schwartz, Dupee & Company, on August 31, 1896, were not the property of the complainants nor any part thereof

51 It is further admitted that the 700 shares of said stock alleged in the bill of complaint to have been sold on the 22nd day of September, 1896, were not delivered to Frank N. Gage, but immediately after said sale said shares of stock were delivered to Major J. W. Conley, one of the firm of Schwartz, Dupee & Company, by H. J. Davis, who conducted said sale on behalf of Henry Clews & Company, for safe keeping by the said J. W. Conley; that afterwards, and on the same day, said H. J. Davis delivered to said Frank N. Gage a memorandum in words as follows:

"SEPTEMBER 22, 1896.

Sold to Frank N. Gage 700 shares of Diamond Match stock numbered A 680–686, inclusive, at $130 per share.

HENRY CLEWS & CO.,
Per ESTABROOK & DAVIS."

That thereupon said Gage wrote below said memorandum the following:

"CHICAGO, *September* 22, 1896. O K.

Please deliver above to I. H. Waggoner, Esq., and accept his check in settlement.

FRANK N. GAGE."

And thereupon said Gage redelivered said memorandum and said order to said H. J. Davis, who thereupon delivered the same to Mr. I. H. Waggoner, together with an order on Schwartz, Dupee & Company to deliver said certificate of shares to said Waggoner, upon being paid the amount of $130 per share. That said Gage was employed by said Waggoner to bid at said sale, and that said Waggoner was acting for and on behalf of the complainant in this suit in the employment of said Gage.

X.

That when the stock exchange reopened on the 5th day of November, 1896, Diamond Match stock was sold for cash at 130 and 130½; and that the settlement price for said stock on that day was 129; and that the settlement prices of said stock from November 5 to December 10, 1896, were as follows:

52

1896.

Nov.	5.	Settlement price	129
	6.	"	133¼
	7.	"	138
	9.	"	144
	10.	"	142½
	11.	"	137½
	12.	"	135
	13.	"	137
	14.	"	135½
	16.	"	131
	17.	"	130½
	18.	"	127½
	19.	"	127½
	20.	"	125½
	21.	"	125½
	23.	"	127½
	24.	"	131½
	25.	"	129½
	27.	"	130
	28.	"	129
	30.	"	129
Dec.	1.	"	130
	2.	"	127½
	3.	"	126½
	4.	"	123½
	5.	"	123
	7.	"	121
	8.	"	121½
	9.	"	119½
	10.	"	120

That the lowest price at which said stock has sold since November 5, 1896, was on December 21, 1896, when the price was 108½, and the highest price was on September 17, 1897, when the price was 161½.

XI.

That Jamieson & Company have settled with Schwartz, Dupee & Company for 450 shares of the 1,150 shares referred to in the clearing-house sheet of August 3, 1897; that such settlement, however, does not include the 700 shares in question in this case.

53

XII.

That it is admitted by counsel for complainant that the $7,000 put up by Schwartz, Dupee & Company was charged by them to the complainants, and that any claim to that fund which they had has been transferred to complainants; that Schwartz, Dupee & Company have no claim whatever of any kind or character against the $14,000 deposited with said exchange, $7,000 of which was contrib-

uted by Schwartz, Dupee & Company and $7,000 by Jamieson & Company as margins deposited by the parties respectively for said 700 shares of Diamond Match stock.

And from the foregoing facts, the master finds as a matter of law:

I.

That inasmuch as the question whether the complainants may invoke the aid of a court of equity in this cause was raised by demurrer to the bill, and was argued by counsel and considered by the court before the order of reference herein, the master does not think it necessary or proper to decide the question of jurisdiction.

II.

That while the contention of defendants' counsel that the constitution, by-laws and rules of the Chicago stock exchange, are a cunningly devised scheme to enable its members to carry on gambling in stocks and bonds in a systematic manner finds some color in the peculiar methods therein provided for trading and substitution of trades and manipulations of margins; and while gambling transactions may easily be carried on thereunder by disregarding the article forbidding fictitious transactions, yet, as there is no evidence in this case showing, or tending to show, that either of the parties to the original trades or to the substituted contracts did not intend to deliver and receive the stock of the Diamond Match Company so sold and bought, this transaction cannot, under the evidence in this case, be held to be a gambling transaction.

III.

That by the substitution made in this case, pursuant to the rules of the clearing department, which all the members of the exchange assented to and agreed to be governed by, and by which all persons directing sales or purchases to be made on said exchange by such brokers are bound, Schwartz, Dupee & Company on the 3d day of August, 1896, sold to Jamieson & Company and Jamieson &
54 Company bought from Schwartz, Dupee & Company 1,150 shares of the stock of the Diamond Match Company at $222 per share, said stock to be delivered and received on the 31st day of August, 1896, and such contract of sale and purchase was duly ratified by the respective parties on that day, and was thenceforth binding upon both parties to the contract.

IV.

That the remedy provided by the by-laws of said exchange for a violation of contract made on the exchange by members thereof is not exclusive and does not oust the court from entertaining jurisdiction of suits to recover damages for a breach of contract made under the constitution, by laws and rules of said exchange; that even were such remedy exclusive when the exchange held daily sessions, as provided for in its constitution, by-laws and rules, it

ceased to be exclusive in this case by reason of the closing of said exchange on said 3d day of August, 1896, and its remaining closed until long after the maturity of said contract, and until the 5th day of November, 1896.

V.

That when substitution of said contract for the sale and purchase of said stock was made on said 3d day of August, 1896, whereby said Schwartz, Dupee & Company sold and said Jamieson & Company bought 1,150 shares of said stock on the terms aforesaid, there was no legal obligation remaining on the part of the original parties to whom said 700 shares of stock were sold to receive the same from Schwartz, Dupee & Company, or on Schwartz, Dupee & Company to deliver said stock to them; that thenceforth there was a valid and binding contract between Schwartz, Dupee & Company and Jamieson & Company for the sale and purchase of said stock on the terms aforesaid, for the violation of which by either party the other party had its right of action.

VI.

That when said Schwartz, Dupee & Company on the 31st day of August, 1896, tendered to Jamieson & Company certificates for 1,150 shares of stock of said Diamond Match Company, which said Jamieson & Company refused to receive, a right of action accrued to Schwartz, Dupee & Company against Jamieson & Company to recover such damages as they had suffered by reason of the refusal of said Jamieson & Company to accept and receive said stock and to pay therefor the price agreed upon in said contract.

55 VII.

That said complainants, having been the principals for whom said Schwartz, Dupee & Company, as brokers, had sold 700 shares of said stock, which afterwards formed a part of the 1,150 shares which on the 3d day of August, by substitution and the ratification of both parties substituted said Schwartz, Dupee & Company sold and said Jamieson & Company purchased for $222 per share, to be delivered and received on the 31st day of August, 1896, said complainants, as such principals, were entitled to maintain an action against said Jamieson & Company for the damages sustained by complainants because of the refusal of said Jamieson & Company to receive said stock when so as aforesaid tendered to them, by Schwartz, Dupee & Company.

VIII.

That it is strenuously contended by counsel for defendants that the sale of 700 shares of stock of the Diamond Match Company on the 22d day of September, 1896, to Frank N. Gage for $130 per share was a mere pretense and a fraud by reason of the fact that said complainants did not own said stock so sold, but borrowed the same from Schwartz, Dupee & Company; that said stock was not

delivered to said Gage, and was not paid for by him, but was immediately after such sale delivered back to Schwartz, Dupee & Company by Mr. Davis, who conducted said sale on behalf of complainants, and that said Gage was employed to bid at said sale by one Waggener, who was acting for and on behalf of the complainants in such employment of said Gage; and that such transaction was not a legal sale and purchase of said stock, but only a colorable and pretended sale and purchase, and does not, therefore, establish, nor tend to establish, the market price of said stock at the time of such sale; that such sale was also irregular and void in this; that when Mr. Barber, the president of the Diamond Match Company bid $135 per share for 200 shares thereof, Mr. Davis, who was making the sale, refused to accept a bid for said 200 shares, unless there was also a bid for the residue of the stock, so that the total amount of the separate bids would aggregate more than the bid of Mr. Gage of $130 per share for the entire 700 shares; and that, therefore, complainants are entitled in any event to recover only nominal damages; yet, inasmuch as said sale was duly advertised by notice mailed to all of the bankers, and all members of said stock exchange in Chicago, and was mentioned in the daily papers of
56 Chicago, and was attended by nearly one hundred persons; that when said stock was offered for sale, bids were started at about the par value thereof and were raised from time to time until Mr. Gage bid $130 per share for the 700 shares; and inasmuch, also, as the then president of the Diamond Match Company was present at such sale and made a bid for 200 shares of said stock—$135 per share—which bid was not entertained because no bid was made for the residue thereof, sufficient to make the several bids aggregate more than the bid of $130 per share for the entire amount; and inasmuch, also, as when the exchange opened on the 5th day of November, 1896, the settlement price of that day was $129 per share, and inasmuch as there is no evidence tending to show that any of the bidders, actual or possible, had any knowledge or information that complainants were not the *bona fide* owners of said stock, nor any evidence tending to show that any bid other than Gage's was not *bona fide* and made with the expectation of receiving and paying for the stock; and since there is nothing in the evidence tending to show that the stock would not have been delivered to any purchaser other than Mr. Gage if he has so desired, or that the bids made were in any way affected by reason of the ownership or non-delivery of said stock, and inasmuch as Gage made the highest bid for the whole stock, and therefore by his bid fixed the market value of the stock higher than it would have been, had it been sold to any bidder for the whole stock other than Gage, and as the only purpose of said sale was to fix the market value of said stock on the 22d day of September, 1896, the master is of the opinion that the result of said sale, as the same was conducted, taken in connection with the market value thereof as established by the said exchange on the day of its reopening, on said 5th day of November, 1896, is *prima facie* evidence tending to show the market value of said stock; and that in the absence of any other

evidence as to such value, the sum so bid for the entire 700 shares—$130 per share—should be considered for the purpose of this suit, as the market value of said stock on the day of such sale; and that the complainants are entitled to a decree adjudging that the defendants, constituting said governing committee of said Chicago stock exchange, pay to complainants said sum of fourteen thousand dollars, so as aforesaid held in trust by them; and that upon the payment thereof, they be discharged from all obligations of their said trust; and further adjudging that seven thousand dollars thereof be applied in liquidation *pro tanto* of the sum hereinbefore found to be due to complainants from said defendants, Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings, constituting the firm of Jamieson & Company, to wit: sixty-four thousand
57 four hundred dollars; and that said last-named defendants pay to the complainants the residue of said sum of $64,400, to wit: the sum of fifty seven thousand four hundred dollars, together with interest thereon at the rate of five per cent. per annum from the 31st day of August, A. D. 1896.

Respectfully submitted.

E. B. SHERMAN,
Master in Chancery United States Circuit Court,
Northern District of Illinois, Northern Division.

Chicago, January 12, 1898.

Master's fees, $500, paid by complainant-.

(Endorsed:) Filed Jan. 22, 1898. S. W. Burnham, clerk.

Objections to Master's Report. Filed Jan'y 22, 1898.

Objections to master's report.

Circuit Court of the United States, Northern District of Illinois.

HENRY CLEWS ET AL.
vs.
MALCOLM M. JAMIESON ET AL. } 24261.

Objections made by the defendants Malcolm M. Jamieson, Roland C. Nickerson, and Harry F. Billings to the report of Master in Chancery E. B. Sherman, to whom the above-entitled cause was referred to take evidence and report the same, together with his findings of fact and law.

The defendants, Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings, object to the report of Master in Chancery E. B. Sherman herein, and assign the following grounds for objection:

1. Said master has found in part two of his report on the facts in this case "that the item '1,150 match 222, Jamieson & Co.' was made up in part of the 700 shares sold by Schwartz, Dupee & Co. on August account for complainant-. That this substitution of Jamieson & Co. for the parties to whom such 700 shares had been originally sold was done by the clearing department of said exchange,

according to its uniform custom." Whereas, in the undisputed evidence presented before the master, and as recited by him in his report, there is absolutely no evidence to sustain a finding
58 that said 700 shares of stock, alleged to have been sold by Schwartz, Dupee & Co. for the account of complainants, was a part of or in any way connected with the item of 150 shares of stock above referred to, or that there was any stock whatever sold by complainants to the defendants, Jamieson & Co.

2. The master has found in part four of his findings on the facts in this case, that "it appeared on the close of business on the third day of August, by the clearing sheet, that Schwartz, Dupee & Company had sold to Jamieson & Company on account for August, 150 shares of the stock of the Diamond Match Company, 700 shares of which are the stock in controversy in this case." Whereas, in the evidence as recited by the master in his report, there is no evidence whatever to show that the said 700 shares of stock were a part of or were in any way whatever connected with said 1,150 shares of stock, or that Schwartz, Dupee & Company, on their account, have sold to the defendants, Jamieson & Company, any shares of said stock, or that there were any transactions whatever between said complainants and said Jamieson & Company with reference to said stock.

3. Each of the propositions of law in this case as announced by the master in his report is erroneous, and the master should have recommended that the bill of complaint herein be dismissed for want of equity.

TENNEY, McCONNELL, COFFEEN & HARDING,
Solicitors for Defendants Jamieson & Co.

The foregoing objections are overruled.
E. B. SHERMAN, *Master.*

(Endorsed:) Filed Jan. 22, 1898. S. W. Burnham, clerk.

Exceptions to Master's Report. Filed Feb'y 7, 1898.

Exceptions to master's report.

Circuit Court of the United States, Northern District of Illinois.

HENRY CLEWS ET AL.
vs.
MALCOLM M. JAMIESON ET AL.

Exceptions taken by the defendants Malcolm M. Jamieson, Roland C. Nickerson, and Harry F. Billings to the report of Master in Chancery E. B. Sherman, to whom the above-entitled cause was referred to take evidence and report the same, together with his findings of fact and law.

The defendants, Malcolm M. Jamieson, Roland C. Nicker-
59 son and Harry F. Billings, except to the report of Master in Chancery E. B. Sherman herein, and assign the following grounds of objection:

1. Said master has found in part two of his report on the facts in the case "that the item '1,150 Match 222 Jamieson & Co.' was made up in part of the 700 shares sold by Schwartz, Dupee & Company on August account for complainant-. That this substitution of Jamieson & Company for the parties to whom such 700 shares had been originally sold, was done by the clearing department of said exchange, according to its uniform custom." Whereas, in the undisputed evidence as presented before the master, and as recited by him in his report, there is absolutely no evidence to sustain a finding that said 700 shares of stock, alleged to have been sold by Schwartz, Dupee & Company for the account of complainants, was a part of or in any way connected with the item of 1,150 shares of stock above referred to, or that there was any stock whatever sold by complainants to defendants, Jamieson & Co.

2. The master has found in part four of his findings on the facts in this case, that "it appears on the close of business on the third day of August, by the clearing sheet, that Schwartz, Dupee & Company had sold to Jamieson & Company on account for August, 1,150 shares of stock of the Diamond Match Company, 700 shares of which are the stock in controversy in this case." Whereas, in the evidence as recited by the master in his report, there is no evidence whatever to show that the said 700 shares of stock were a part of or were in any way whatever connected with said 1,150 shares of stock, or that Schwartz, Dupee & Company on their account, have sold to the defendants, Jamieson & Company any shares of said stock, or that there were any transactions whatever between said complainants and said Jamieson & Company, with reference to said stock.

3. Each of the propositions of law in this case, as announced by the master in his report, is erroneous, and the master should have recommended that the bill of complaint herein be dismissed for want of equity.

TENNEY, McCONNELL, COFFEEN & HARDING,
Solicitors for Defendants Jamieson & Co.

(Endorsed:) Filed Feb. 7, 1898. S. W. Burnham, clerk.

60 Afterwards, to wit, on the twenty-fifth day of April, 1898, there was filed in the clerk's office of said court a certain stipulation, which said stipulation is in the words and figures following, to wit:

Stipulation. Filed April 28, 1898.

Stipulation.

Circuit Court of the United States, Northern District of Illinois.

HENRY CLEWS ET AL.
vs.
MALCOLM M. JAMIESON ET AL. } 24261.

It is hereby stipulated that the complainants may file instanter an amended bill, that the defendants Jamieson & Company, may file

an answer to said amended bill instanter, that the answer of the other defendants to the original bill shall stand as the answer to the amended bill, and that the replications heretofore filed shall stand as replications to all the answers.

It is further stipulated that the parties may file instanter a stipulation admitting certain facts, and that this case shall now stand for final hearing upon the pleadings as so amended, the testimony taken before E. B. Sherman, master in chancery herein, the report of said master and the stipulation of the facts above referred to.

LOWDEN, ESTABROOK & DAVIS,
Solicitors for Complainants.
TENNEY, McCONNELL, COFFEEN & HARDING,
Solicitors for Defendants Jamieson, Nickerson, and Billings.
CHESTER M. DAWES,
Solicitor for Defendants Described in said Bill as Governing Committee, Chicago Stock Exchange.
SCHWARTZ, DUPEE & COMPANY.

(Endorsed:) Filed Apr. 25, 1898. S. W. Burnham, clerk.

61 On the same day, to wit: the twenty-fifth day of April, 1898, in the December term of said court, 1897, in the record of proceedings thereof in said entitled cause before the Hon. Peter S. Grosscup, district judge, appears the following entry, to wit:

Order: Leave to File Amended Bill, etc.

Order of April 25, 1898.

HENRY CLEWS ET AL.
vs.
MALCOLM M. JAMIESON ET AL. } 24261.

Upon the stipulation of the parties hereto, it is hereby ordered that the complainants may file instanter an amended bill, that the defendants, Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings may file an answer thereto instanter; that the answers of the other defendants now on file to the original bill shall stand as answers to the amended bill, and that the replications heretofore filed shall stand as replications to all the answers.

It is further ordered that the parties may file instanter a stipulation admitting certain facts and that this cause shall now stand for final hearing upon the pleadings as so amended and herein recited, the testimony taken before E. B. Sherman, master in chancery herein, and the report of said master and the stipulation of facts filed herein.

And on the same day, to wit: the twenty-fifth day of April, 1898, came the complainants in said entitled cause by their solicitors and by leave of court first had and obtained file in the clerk's office of said court their amended bill, which said amended bill is in the words and figures following, to wit:

Amended Bill. Filed April 25, 1898.

Amended bill.

Circuit Court of the United States, Northern District of Illinois, Northern Division.

HENRY CLEWS ET AL.
vs.
MALCOLM M. JAMIESON ET AL. } 24261.

To the honorable the judges of the circuit court of the United States within and for the northern district of Illinois, northern division:

Henry Clews, Charles M. Foster and James B. Clews of the
62 city of New York and citizens of the State of New York bring this their amended bill against Malcolm M. Jamieson, Roland C. Nickerson, Harry F. Billings, Edwin G. Foreman, Charles Henrotin, A. W. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, H. Herbst, Henry C. Hackney, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cohn, B. B. Lamb, Charles C. Yoe, William V. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, of the city of Chicago and citizens of the State of Illinois, and George A. McClellan of Kenilworth, Illinois, and a citizen of the State of Illinois, and A. L. Dewar of Glencoe, Illinois, and a citizen of the State of Illinois, whose names your orators are unable to more fully set forth; Gustavus A. Schwartz, John Dupee, John W. Conley and Isaac J. Bloom of Chicago, Illinois, and citizens of the State of Illinois.

And thereupon your orators complain and say that they are residents and citizens of the State of New York and that all said defendants are citizens of the State of Illinois residing in the northern district thereof, and that this is a suit of a civil nature in which there is a controversy between citizens of different States in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars ($2,000).

And further complaining your orators say that they are a copartnership doing business in the city of New York, buying and selling stocks, bonds and other securities under the name of Henry Clews & Company; that the defendants, Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings, constitute a copartnership under the name of Jamieson & Company, conducting the business of buying, selling and exchanging bonds, stocks and other securities, and also a general brokerage business for the purchase and sale of like properties; that in the city of Chicago several years ago there was organized a voluntary association of stock brokers and persons engaged in the business of buying and selling stocks, bonds and securities, which association adopted the name of the Chicago stock exchange, and adopted a constitution and by-laws for the government of said association. Said association was formed for the purpose of opening an exchange where its members could

meet together to buy and sell such stocks and securities as should be listed with said exchange, and where its members could make contracts for said sales and purchases under the rules and customs of said exchange. Under the constitution and by-laws of said association the whole government of the exchange was vested in a governing committee composed of the president of the exchange
63 and twenty-four (24) members; and your orators show that during the month of July, 1896, and since, up to the time of the filing of the original bill, the governing committee duly elected and acting as such were, the defendants, Malcolm M. Jamieson, Edwin G. Foreman, Charles Henrotin, A. W. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, H. Herbst, Henry C. Hackney, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William V. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, George A. McClellan, and A. L. Dewar.

And further complaining your orators show unto your honors that in the month of July, 1896, they directed their brokers in Chicago, Messrs. Schwartz, Dupee & Company, being composed of Gustavus A. Schwartz, John Dupee, John W. Conley and Isaac J. Bloom, to sell on account of your orators at the rooms of the Chicago stock exchange and in accordance with its rules and customs, seven hundred (700) shares of the capital stock of the Diamond Match Company, a corporation, which stock has been duly listed as one of the stocks which might be sold and purchased in said exchange; and your orators directed said Schwartz, Dupee & Company to sell said shares for delivery on the 31st day of August, 1896. On August 3, 1896, said Schwartz, Dupee & Company sold on said exchange to defendants, Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings eleven hundred and fifty (1,150) shares of the capital stock of the Diamond Match Company, and agreed and contracted to deliver the same to the said Jamieson & Company, or to such persons as might become the assigns of said contract under the rules of said exchange on the 31st day of August, 1896, and the said Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings agreed to accept and receive said stock from said Schwartz, Dupee & Company on the 31st day of August, 1896, at the agreed price of two hundred and twenty-two dollars ($222.00) per share for each and every share of said stock.

And your orators show that said sales were made by the said Schwartz, Dupee & Company in their names, but therein as to seven hundred (700) of said shares included in said eleven hundred and fifty (1,150) shares they were acting for and in behalf of your orators, as your orators' agents or brokers, and as to the remaining four hundred and fifty (450) shares the said Schwartz, Dupee & Company were acting on behalf of other clients than the complainants.

And your orators further show that on the third day of August,
64 1896, the manager of the clearing-house of said exchange being thereto by the rules and by-laws of said exchange duly authorized delivered to said Schwartz, Dupee & Company a

statement showing a sale by said Schwartz, Dupee & Company to the said Jamieson & Company of said eleven hundred and fifty (1,150) shares of stock, and said manager also delivered to said Jamieson & Company a statement showing a purchase by said Jamieson & Company from said Schwartz, Dupee & Company of said stock.

And your orators further show that on the 31st day of August, 1896, and during the business hours provided by the rules, by-laws and customs of said exchange, the said Schwartz, Dupee & Company tendered to the defendants, Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings certificates for eleven hundred and fifty (1,150) shares of the Diamond Match Company, duly issued by it, and duly endorsed and transferred so as to vest in the said defendants the title thereto upon delivery thereof and the said Schwartz, Dupee & Company then and there offered to carry out said contract of sale and offered to deliver said shares of stock to the said defendants, but the said defendants refused to accept the same, and refused to carry out their said contract of purchase, and refused to pay the said Schwartz, Dupee & Company for said stock.

And your orators further show that upon said refusal of said defendants to carry out their contract the said Schwartz, Dupee & Company informed your orators of said refusal, and on the 11th day of September, 1896, said Schwartz, Dupee & Company, in writing, notified said defendants, Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings, that said sale as to seven hundred (700) shares of said stock was made by the said Schwartz, Dupee & Company as agents for and on behalf of your orators, and notified said defendants that your orators might rightfully take any proceedings to enforce said contracts of sale, and to make settlement of said transaction as to the said seven hundred (700) shares. And thereupon upon the same day your orators notified the said defendants that your orators would proceed to sell said seven hundred (700) shares of stock at public auction to the highest bidder for cash; and that your orators would look to said defendants to pay and settle any difference and any loss or damage accruing to your orators if said stock should sell for less than the price which the said defendants had agreed to pay therefor. And your orators also notified said defendants that in the meantime they held said stock ready for delivery to said defendants upon payment of the amount due on said contract of sale as to said seven hundred (700) shares. But the said defendants utterly refused to pay for and receive said stock, and thereupon your orators proceeded to advertise said stock for sale at public auction.

65 And thereupon your orators did, on the 22d day of September, 1896, offer the same for sale, at public auction, and the same was struck off to the highest bidder for the sum of one hundred and thirty dollars ($130) per share.

And your orators show that they made every reasonable effort by advertisement and by bringing notice of said sale before the public, and before brokers and bankers generally in Chicago and vicinity, to induce persons to bid at said sale, but that your orators were un-

able to obtain a greater sum for said stock than one hundred and thirty dollars ($130.00) per share.

And your orators further show unto your honors that on the 31st day of August, 1896, the said shares of stock were worth in the market not to exceed one hundred and thirty dollars ($130) per share, and that your orators have suffered damages to the amount of sixty-four thousand four hundred dollars ($64,400.00) by reason of the failure of said defendants to accept and pay for said stock, and that the expense of selling the same at auction was the sum of forty-six dollars and seventy-five cents ($46.75).

And your orators further show that on the 23d day of September, 1896, they notified said defendants, Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings of said sale and of the amount bid for said stock, and that your orators should hold the said defendants liable for the difference between the price agreed to be paid by said defendants for said stock, and the price bid at said auction, and for all other damages which your orators had sustained by reason of their failure to accept and pay for said stock.

And your orators further show that at the time said contract for the sale of said stock was made upon the stock exchange the said Schwartz, Dupee & Company, as provided by the rules of the stock exchange, deposited with the clearing-house of said stock exchange the sum of eleven thousand five hundred dollars ($11,500.00) being ten dollars ($10.00) per share on the stock sold as aforesaid, in trust as security for the faithful performance on their part and on the part of the clients for whom they were acting of said contract of sale, and at the same time the said defendants, Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings also deposited with the clearing-house of said stock exchange the sum of eleven thousand five hundred dollars ($11,500.00), being ten dollars ($10.00) per share, in trust to secure the faithful performance on the part of said defendants of their contract to purchase said stock and to pay for the same; and the manager of said clearing-house, under the rules and by-laws of said stock exchange, received said sums and the same were, at the time
66 the original bill was filed herein, in the control and possession of the governing committee of said stock exchange, to wit: the defendants, Malcolm M. Jamieson, Edwin G. Foreman, Charles Henrotin, A. W. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, H. Herbst, Henry C. Hackney, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William V. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, George A. McClellan and A. L. Dewar.

And your orators further show that on the 24th day of September, 1896, the said Schwartz, Dupee & Company requested the said Jamieson & Company to consent that the Chicago stock exchange pay to the said Schwartz, Dupee & Company seven thousand dollars ($7,000) of the amounts so deposited to secure the performance of said contract, and offered to credit the said Jamieson & Company with said amount deposited by them, to wit: seven thousand dollars ($7,000) on the damages sustained by reason of the default of said

Jamieson & Company. And your orators, in writing, joined in said request and offered upon receipt of said amount by Schwartz, Dupee & Company to credit the said Jamieson & Company with the amount thereof.

And your orators further show that on the 24th day of September, 1896, the said Schwartz, Dupee & Company notified the defendants above named the governing committee of the Chicago stock exchange that said contract of sale as to seven hundred (700) shares was made by them on behalf of your orators, and demanded of said Chicago stock exchange and its governing committee the payment to them of the amount of said deposits on account of seven hundred (700) shares, to wit: ten dollars ($10.00) per share deposited by Schwartz, Dupee & Company, and ten dollars ($10.00) per share deposited by Jamieson & Company. And your orators in writing concurred in said request.

And your orators well hoped that no dispute would have arisen touching the said purchase of said stock or the payment therefor, according to said contract, or the payment to your orators of their loss and damage sustained by reason of the default of said Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings, or touching the right of your orators to receive the moneys deposited in the clearing-house of the said the Chicago stock exchange in trust as security for the faithful performance by the said defendants of their contract, but that the said defendants Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings would comply with the reasonable request of your orators to consent that the said money should be paid to your orators, and that said other defendants would
67 comply with your orators' reasonable request to pay said money to your orators, as in conscience and equity said defendants ought to do.

But now so it is may it please your honors, that the said defendants combining and confederating among themselves and with divers other persons, at present unknown to your orators whose names when discovered they pray — may be at liberty to insert herein with apt words to charge them as parties defendant hereto, and contriving how to wrong and injure your orators in the premises, they, the said defendants, absolutely refuse to comply with such requests, and they, the said Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings, at times pretend that they never made any contract either for themselves or for your orators, and they at other times pretend that said Schwartz, Dupee & Company never offered to deliver said shares of stock either for themselves or for your orators, and they at other times pretend that your orators have suffered no loss by reason of their failure to perform said contract; whereas, your orators charge the contrary thereof to be the truth. All of which acts, doings and pretenses of the said defendants are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orators in the premises. In consideration whereof, and forasmuch as your orators are entirely remediless in the premises according to the strict rules of the com-

mon law and can only have relief in a court of equity where matters of this nature are properly cognizable and relievable.

To the end therefore that the said defendants may, if they can, show why your orators should not have the relief hereby prayed, and may, according to the utmost and best of their respective remembrance, knowledge, information, and belief full, true, direct, and perfect answer make to all and singular the premises, but not under oath, oath to said answers being hereby expressly waived. And that the said defendants may come to a fair and just account of all the losses and damages sustained by your orators by reason of the failure of said Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings to accept and pay for said stock; and that the defendants may come to a fair and just account of the amounts deposited in the said the Chicago stock exchange, as security for the performance of said contract; and that the said Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings may be decreed to pay to your orators the amount of said damages; and that said other defendants may be decreed to pay and deliver to your orators said trust fund, and that your orators may be further and otherwise relieved in the premises according to equity and good conscience.

May it please your honors to grant unto your orators the
68 most gracious writ of subpœna of the United States of America to be directed to the said Malcolm M. Jamieson, Roland C. Nickerson, Harry F. Billings, Edwin C. Foreman, Charles Henrotin, A. W. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, Henry C. Hackney, H. Herbst, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William V. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, George A. McClellan, A. L. Dewar, Gustavus A. Schwartz, John Dupee, John W. Conley, Isaac J. Bloom and the rest of the confederates, when discovered, thereby commanding them and every of them, at a day certain, under a certain pain therein to be inserted, personally to be and appear before your honors in this honorable court, then and there to answer all and singular the premises and to stand to, perform and abide such order and decree therein as to your honors shall seem meet, and your orators shall ever pray.

LOWDEN, ESTABROOK & DAVIS,
Solicitors for Complainants.

HERBERT J. DAVIS, *Of Counsel.*
FRANK O. LOWDEN, *Of Counsel.*

(Endorsed:) Filed Apr. 25, 1898. S. W. Burnham, clerk.

On the same day, to wit, the twenty-fifth day of April, 1898, came Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings, by their solicitors, and filed in the clerk's office of said court their answer to the amended bill of complaint, which said answer is in words and figures following, to wit:

Answer of Jamieson et al. to Amended Bill. Filed April 25, 1898.

Answer.

Circuit Court of the United States, Northern District of Illinois.

HENRY CLEWS ET AL.
vs.
MALCOLM M. JAMIESON ET AL.

The separate answer of Malcolm M. Jamieson, Roland C. Nickerson, and Harry F. Billings, defendants, to the amended bill of complaint of Henry Clews, Charles M. Foster, and James B. Clews.

69 These defendants, now and at all times hereafter, saving and reserving unto themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties or other imperfections in the said bill contained, for answer thereunto, or to so much or such parts thereof as these defendants are advised it is or are material or necessary for them to make answer unto, answering say:

These defendants admit that in the month of July, 1896, they constituted a copartnership under the name of Jamieson and Company, and were conducting a business of buying, selling and exchanging bonds, stocks and other securities, and also a general brokerage business for the purchase and sale of like properties. But they say that in the month of July, 1896, they bought and sold neither bonds, stocks nor securities for themselves, and that the firm of Schwartz, Dupee & Company, mentioned in said bill as the agents of the complainants, were so informed and well knew. They admit that there was in existence in July, 1896, in the city of Chicago, a voluntary association of stock brokers known as the Chicago stock exchange, and that such association had adopted a constitution and by-laws for the government of said association, and that said association was formed for the purpose of opening an exchange, where its members could meet together to buy and sell such stocks and securities as should be listed with said exchange.

Further answering, they admit that the whole government of the said stock exchange was vested in a governing committee, as set out in the said bill of complaint.

Further answering, these defendants say that they have no personal knowledge of the transactions between the complainants and Schwartz, Dupee & Company, referred to in the bill, but upon information and belief they charge that all of the orders which the complainants gave to Schwartz, Dupee and Company, for the sale by said Schwartz, Dupee and Company of Diamond Match stock on behalf of the complainants, during the month of July, 1896, were filed by Schwartz, Dupee and Company before August 1, 1896, by said Schwartz, Dupee and Company making contracts for such sale and delivery on the stock exchange; but they deny that any of said orders were filled by selling, or making contracts for the sale of said stock to these defendants, and deny that they were parties to any of

the contracts which Schwartz, Dupee and Company made, either in their own names, or on behalf of said complainants, in executing the orders referred to in the bill.

Further answering, these defendants deny that on August 3, 1896, Schwartz, Dupee and Company sold on the exchange to these defendants 1,150 shares of the stock of the Diamond Match
70 Company, for delivery on August 31, 1896, as in said bill alleged, or that these defendants agreed to accept and receive said stock; and these defendants deny that they did, on August 3, 1896, make any purchase from Schwartz, Dupee and Company, as agents or brokers for the complainants, of stock of the Diamond Match Company. But they admit that on or about August 3, 1896, the manager of the clearing-house of said stock exchange delivered to them a memorandum, stating that he has settled all of their trades on the stock exchange of that day, by substituting them as purchasers from Schwartz, Dupee and Company of 1,150 shares of Diamond Match stock. These defendants say, however, that this substitution, if it had any effect at all, which they do not admit, did not substitute these defendants as purchasers in any contract of sale which Schwartz, Dupee and Company had made, either on August 3, 1896, or prior thereto, as brokers or agents of the complainants, nor did it in any manner change or affect the contracts which Schwartz, Dupee and Company had theretofore made on behalf of the complainants, for the sale of Diamond Match stock; but, on the contrary, said substitution was a mere attempt at a settlement of differences of all of the sales in Diamond Match stock made on that day by the different members of stock exchange, including Schwartz, Dupee and Company and these defendants, for the convenience of adjusting transactions between the brokers themselves, but without affecting in any way the rights or liabilities of the principals whom said brokers respectively represented, and for whom they had made such purchases and sales. And that the sales of Diamond Match stock which Schwartz, Dupee and Company made on August 1, 1896, and which were made the basis of the substitution above referred to, were not—except to the extent of 50 shares—sales which they made to these defendants at all, nor were they sales which were made by Schwartz, Dupee and Company on behalf of the complainants; but, on the contrary, the orders which the complainants had theretofore given Schwartz, Dupee and Company for the sale of Diamond Match stock had been, prior to that date, filed by Schwartz, Dupee and Company, by making sales to other parties than these defendants, and at a different price than that stated by the manager of the clearing-house, in the substitution above referred to.

These defendants, further answering, say that they admit that on the 31st day of August, 1896, the said Schwartz, Dupee and Company tendered to these defendants certificates for 1,150 shares of stock of the said Diamond Match Company, but whether they were duly issued by the said Diamond Match Company, or whether they were endorsed and transferred so as to vest—if accepted—in
71 the said defendants the title thereto upon the delivery thereof, these defendants do not know. They do admit, however, the

tender of said 1,150 shares of stock, and their refusal to accept and pay for the same.

Further answering, these defendants say they do not know whether the said Schwartz, Dupee and Company informed the complainants of said refusal, or not; but they admit that on the 11th day of September, 1896, Schwartz, Dupee and Company, in writing, notified these defendants that said sale was made by the said Schwartz, Dupee and Company, as agents for and on behalf of the complainants, and notified these defendants that the complainants might rightfully take proceedings to enforce said contract of sale, and to make settlement of said transaction, and that upon the same day the complainants notified these defendants that they would proceed to sell said shares of stock at public auction, to the highest bidder for cash, and that the complainants would look to these defendants to pay and settle any difference, and any loss or damage accruing to the complainants, if said stock should sell for less than the price which the said complainants pretended, and still pretend, that the defendants had agreed to pay therefor.

And these defendants, further answering, say that they informed Schwartz, Dupee and Company, upon the 31st day of August, 1896, and said complainants upon the 11th day of September, 1896, that any contracts which they had made with said Schwartz, Dupee and Company, at any time in the month of July, 1896, had been made for and on account of W. H. and J. H. Moore.

Further answering, these defendants say, with reference to the pretended sale of said 700 shares of Diamond Match Company stock, on September 22, 1896, referred to in the bill, that no sale was in fact made by said complainants, as alleged in the bill, and that the complainants did not then have or own said stock, but that the sale which they pretended to make, and which is referred to in the bill, was a mere colorable and fictitious one, to carry out which they borrowed from Schwartz, Dupee and Company, or some one else, certain certificates of stock in the Diamond Match Company, which were loaned to them merely for the purpose of using at such fictitious sale; that they had arranged beforehand to have said stock bid in by some one who should appear to be a purchaser thereof, but who was in fact acting on their behalf; that the sale which is referred to in the bill was made to this man; that no delivery was made of the stock to him, nor was any money paid by him for the stock, nor any change made in the situation of any of the parties to said sale, either by transfer of the certificates which were used for that purpose, or by the payment of any money, or otherwise. And these defendants further say, that at said sale there was present a
72 *bona fide* bidder, who offered to pay for 500 shares of said stock one hundred thirty-five dollars ($135) a share, but that said complainants refused to sell said stock to him, and carried out their plan of making a fictitious sale thereof at a lower price, to their agent, at one hundred thirty dollars ($130) per share.

And these defendants, further answering, deny that said complainants have suffered damages to the extent of sixty-four thousand four hundred dollars ($64,400), as claimed in said bill, or that they

have suffered any damage, by reason of the failure or refusal of these defendants to accept and pay for said stock.

Further answering, these defendants admit that on the 23d day of September, 1896, the complainants notified them of said sale and of the amount bid for said stock, and that the complainants proposed to hold these defendants liable for the difference between the price which the complainants aver—but which these defendants deny—was agreed to be paid by these defendants for said stock and the price bid at said auction, and for other damages which the complainants pretend they have sustained by reason of these defendants' failure to accept and pay for the said stock. And these defendants, further answering, admit that about August 3d the said Schwartz, Dupee & Company deposited with the clearing-house of said stock exchange the sum of eleven thousand five hundred dollars ($11,500.00), and that the defendants also deposited with the said clearing-house the sum of eleven thousand five hundred dollars ($11,500.00); but they deny that any deposit was made by the said Schwartz, Dupee & Company, for or in behalf of the complainants, and they say that the said deposits were made by said Schwartz, Dupee & Company and by the defendants under the rules of said stock exchange, and for the security of the respective members of the said stock exchange connected with the substitution of said 1,150 shares.

These defendants admit that on the 24th day of September, 1896, the said Schwartz, Dupee & Company requested these defendants to consent that the Chicago stock exchange pay to the said Schwartz, Dupee & Company seven thousand dollars ($7,000.00) which they then and there pretended had been deposited on account of the said pretended purchase and sale, and offered to credit these defendants with seven thousand dollars ($7,000.00); and these defendants do not deny that the complainants joined in the request and offer regarding said deposit by said Schwartz, Dupee & Company.

And these defendants, further answering, say that they do not know whether on the 25th day of September, 1896, the said Schwartz, Dupee & Company notified the governing committee of the Chicago stock exchange that certain contracts of sale with
73 these defendants, were made by them on behalf of the complainants, and then and there demanded of the Chicago stock exchange and its governing committee, the payment to them of certain deposits, or whether the complainants, in writing concurred in the said request.

These defendants, further answering, say that the only purchase of Diamond Match Company stock made by them from the said Schwartz, Dupee & Company, in the month of July, 1896, or August, to be delivered August 31st, or any day in that month, was for 50 shares of stock, and that they were informed and believe that the said 50 shares of stock were not sold by the said Schwartz, Dupee & Co. for the complainants herein.

And these defendants, further answering, say that on the 3d day of August, 1896, the Chicago stock exchange was closed by order of the governing committee thereof, and so remained closed until the

5th day of November, 1896, and that from the said August 3d to the said November 5, 1896, there were no purchases or sales of stocks or securities upon the Chicago stock exchange.

And these defendants, further answering, say that whatever purchases of stock were made, or agreements to purchase, by these defendants, from the said Schwartz, Dupee & Company, acting for themselves, or as agents for the complainants herein, were made in view of, because of, and entirely on account of the constitution, by-laws and rules of the Chicago stock exchange.

And these defendants, further answering, say that it is provided in and by article XVII of the by-laws of the said Chicago stock exchange, of which the defendants and Schwartz, Dupee & Company were members, as follows:

"Should any member neglect to fulfill his contract on the day it becomes due, the party or parties contracting with him shall, after giving notice as required by section 2 of the preceding article, employ an officer of the board to close the same forthwith in the exchange by purchase or sale as the case may require, unless the price of settlement has been agreed upon by the contracting parties. In case of a failure of a creditor to close the contract as above, the price shall be fixed by the price current at the time such contract ought to have been closed under the rule. In all cases where an officer may be directed to buy or sell securities under this rule, the name of the member defaulting, as well as that of the member giving the order shall be announced. No order for the purchase or sale of securities under this rule shall be executed unless made out in writing over the signature of the party giving the order, who shall state the reason therefor; and it shall be the duty of the officer
74 who executes the order to endorse thereon the name of the purchaser or seller, the price and the hour at which the contract is closed, and hand the same to the secretary of the board, who shall within twenty-four hours, ascertain whether the party for whose account the order was given has paid the difference, if any, arising from the transaction; if not, the secretary shall report the default to the president. The duty devolved upon the officers of the exchange under this rule shall be performed without charge. No party shall be permitted to supply offers to buy or sell securities closed for his account under the rule; and when a contract is closed under this rule any action of the defaulter, direct or indirect, by which the prompt fulfillment of such contract is delayed, hindered or evaded to the detriment of the other contracting party, shall subject the offending party to suspension for not less than thirty days in the discretion of the governing committee, by a vote of two-thirds of the members present at the meeting. When contracts are closed out under the rule, any member supplying the bid or offer, and not duly receiving or delivering the stock, as the case may be, renders himself liable to prosecution under this article. Should any stock thus sold not be delivered until the next day, the contract shall continue, but the defaulting party shall be liable to pay such damage as may be assessed by the arbitration committee. The same rules as to notice, time and place that govern defaults in other contracts shall

apply to borrowed securities, which on non-delivery or receipt, must be borrowed or loaned in open market, except in case of actual default in receiving or delivering after notice to close the loan; then the same are to be bought or sold, as the case may be, for account of the defaulter in the manner provided in this article."

These defendants, further answering, say that the notice provided in section 2 of article XVI, and referred to in said article XVII, reads as follows:

"The notice above referred to shall be either personal, or shall be left in writing at the office of the party to be notified, or in case he has no office, then by public announcement, whenever the exchange may be in session."

And these defendants, further answering, say that both buyers and sellers of stock on the stock exchange, were entitled to the protection and advantages afforded by the constitution, by-laws and rules of said stock exchange, and that only upon said stock exchange was it possible, or is it now, in the city of Chicago, to obtain a fair or adequate price for stocks which are covered by contracts of either sale or purchase, made between members thereof.

75 And these defendants, further answering, say that all contracts for purchase or sales of stock, whether of the Diamond Match Company, or of any other stocks, made between Schwartz, Dupee & Company and these defendants in the month of August, 1896, were made under the by-laws above set forth, and with the agreement that said by-law should be a part of the contract.

And these defendants, further answering, say that during the time said stock exchange was closed, from the said August 3d until November 5, 1896, there were no means of carrying out the contracts made between members thereof, for the purchase and sale of stocks and other securities, and that in consequence thereof all purchase contracts failed, or settlements thereof must have been deferred until the opening of said stock exchange.

And these defendants submit to this honorable court, that all and every the matters in complainants' bill mentioned and complained of are matters which may be tried and determined at law, and with respect to which the complainants are not entitled to any relief from a court of equity. And these defendants ask that they shall have the same benefit for their defense, as if they had demurred to the complainants' bill, and pray to be dismissed with their reasonable costs and charges, in this behalf most wrongfully sustained.

MALCOLM M. JAMIESON,
ROLAND C. NICKERSON,
HARRY F. BILLINGS,
By TENNEY, McCONNELL, COFFEEN & HARDING, *Their Solicitors.*

TENNEY, McCONNELL, COFFEEN & HARDING,
Solicitors for Above Defendants.

(Endorsed:) Filed Apr. 25, 1898. S. W. Burnham, clerk.

On the same day, to wit: the twenty-fifth day of April, 1898, there was by leave of court filed in the clerk's office of said court a certain stipulation of facts, which said stipulation of facts is in the words and figures following, to wit:

76 *Stipulation of Facts. Filed April* 25, 1898.

Stipulation of facts.

Circuit Court of the United States, Northern District of Illinois.

HENRY CLEWS ET AL.
vs.
MALCOLM JAMIESON ET AL. } 24261. In Chancery.

It is hereby stipulated between the parties to this cause, for the purposes of the trial thereof, that the following are facts, with reference to the transactions referred to in the pleadings herein, and in the evidence heretofore taken before the master.

That the purchases and sales of Diamond Match stock by Jamieson & Company, on behalf of different customers who employed them on the Chicago stock exchange, on July 25, 1896, with the names of the other members of the stock exchange, with whom the transactions were had, were as follows:

JAMIESON & CO.

	Bo't.	Sold.	Price.	July acc't.	Broker.
	50		229		Townsend, J. J.
	200		229		Brewster, E. L. & Co.
	50		228⅞		Brewster, E. L. & Co.
		50	227		Schwartz, Dupee & Co.
	100		229		Wilson & Sturges.
	50		228⅞		Foreman Bros.
	100		229		Spencer & Macdonald.
		50	226		Spencer & Macdonald.
		50	228		McClelland, Geo. A.
	150		229		Baldwin, Farnum & Co.
		100	227		Baldwin, Farnum & Co.
	50		228½		Breese & Cummings.
	50		228⅞		Counselman & Day.
	800	250			
	250				
Balance	550	Bought.			
		Sold.		Aug. acc't.	
	50		228		Spencer & Macdonald.
		100	231⅜		Spencer & Macdonald.
	50		230¼		Lobdell & Farwell.
	50		229		Wilson & Sturges.
	50		229		Wilson & Sturges.
		100	231½		Wilson & Sturges.
		200	231¼		Wilson & Sturges.

	Bo't.	Sold.	Price.	Aug. acc't.	Broker.
77	50		231½		Adsit, C. C.
	50		229		Schwartz, Dupee & Co.
	50		229⅛		Townsend, J. J.
		50	231½		Townsend, J. J.
	50		229		Dewar, A. L. & Co.
		50	231½		Baldwin, Farnum & Co
		50	231½		Herbst, Herman.
		50	231½		Peters, U. G. & Co.
	400	600			
		400			
Balance.....		200 sold			

That the purchases and sales of Schwartz, Dupee & Co. of Diamond Match stock, on the Chicago stock exchange, on behalf of the various customers who employed them, on the same day, 25th July, were as follows:

SCHWARTZ, DUPEE & Co.

	Bo't.	Sold.	Price.	July acc't.	Broker.
	100		229		Peters, R. A.
	100			229¼	Peters, R. A.
	100		228⅞		Brewster, E. L. & Co.
	50		227		Jamieson & Co.
	50		227		King, Alward & Co.
	100		227		Wilson & Sturges.
	300		227		Wasmansdorff, Wm. G.
Balance.	800	bought			
				Aug. acc't.	
		50	229		Jamieson & Co.
		50	229		King, Alward & Co.
		100	229		Wilson & Sturges.
		300	229		Wasmansdorff, Wm. G.
Balance.....		500			

78 That the settlement or substitution sheet furnished to Jamieson & Co. by the clearing-house of the stock exchange, as the result and settlement between Jamieson & Company and the other members of the stock exchange, of these transactions—omitting that part which refers to transactions in other stocks—was as follows:

CHICAGO, *July* 27, 1896.

We have settled all trades on your sheet this day with the following exceptions, which have been substituted:

Bought.	Sold.	Stock.	Price.	Substitution.
550		M	227½	Brewster, E. L. & Co.

Second Account.

CHICAGO, *July* 27, 1896.

We have settled all trades on your sheet this day, with the following exceptions, which have been substituted:

Bought.	Sold.	Stock.	Price.	Substitution.
100		Match	228	Adsit, J. M.
100		Match	228	Foreman Bros.

That the purchases and sales by Jamieson & Co., on behalf of different customers who employed them, of Diamond Match stock on the Chicago stock exchange, on July 27, 1896, with the names of the other members of the stock exchange with whom the transactions were had, were as follows:

79 JAMIESON & Co.

	Bo't.	Sold.	Price.	July acc't.	Broker.
	550		Substi-		Brewster, E. L. & Co.
		50	tution		Slaughter, A. O. & Co.
		50	226¾		Jones, G. E.
		100	226¾		Baldwin, Farnum & Co.
		550	226¾		Foreman Bros.
			226¾		
	550	750			
		550			
Balance		200	sold		
		100	Substi-	Aug. acc't.	Adsit, J. M.
			tution		
			Substi-		
		100	tution		Foreman Bros.
	550		229		Foreman Bros.
	50		229		Jones, G. E.
	100		229		Baldwin, Farnum & Co.
	50		229		Slaughter, A. O. & Co.
	750	200			
	200				
	200				
Balance	550	Bought			

That the purchases and sales of Schwartz, Dupee & Co., of Diamond Match stock, on the Chicago stock exchange, on behalf of the various customers who employed them, on the same day, July 27th, were as follows:

Bought.	Sold.	Price.	July acc't.	Broker.
	350	226¾		Peters, R. A.
350		226¾		Peters, R. A.
Balance ...				
			Aug. acc't.	
	50	223	Substituted.	Peters, U. G. & Co.
	450	228	Substituted.	Dewar, A. L. & Co.
	350	229		Peters, R. A.
350		229		Peters, R. A.
	850			
	350			
Balance	500 sold.			

That the settlement or substitution sheet furnished to Jamieson & Co. by the clearing-house of the stock exchange, as the result and settlement between Jamieson & Co., and the other members of the stock exchange, of these transactions—omitting that part which refers to transactions in other stocks—was as follows:

CHICAGO, *July* 28, 1896.

We have settled all trades on your sheet this day, with the following exceptions, which have been substituted:

Bought.	Sold.	Stock.	Price.	Substitution.
	200	M.	223	Wright, Geo. E. & Co.

2d Account.

CHICAGO, *July* 28, 1896.

We have settled all trades on your sheet this day, with the following exceptions, which have been substituted:

Bought.	Sold.	Stock.	Price.	Substitution.
350		M.	225¼	Baldwin, Farnum & Co.
200		"	"	Breese & Cummings.

That the purchases and sales by Jamieson & Co. on behalf of different customers who employed them, of Diamond Match
81 stock on the Chicago stock exchange on July 28, 1896, with the names of the other members of the stock exchange with whom the transactions were had, were as follows:

JAMIESON & CO.

Bo't.	Sold.	Price.	July acc't.	Broker.
Balance.	200	Substitution.		Wright, Geo. E. & Co.
350		Substitution.	Aug. acc't.	Baldwin, Farnum & Co.
200		Substitution.		Breese & Cummings.
100		222		Adsit, C. C.
50		222		McClellan, Geo. A.
50		222		Lobdell & Farwell.
Bal. 750 bought.				

That the purchases and sales of Schwartz, Dupee & Co. of Diamond Match stock on the Chicago stock exchange, on behalf of the various customers who employed them, on the same day, July 28th, were as follows:

SCHWARTZ, DUPEE & CO.

Bo't.	Sold.	Price.	Aug. acc't.	Broker.
	500	225¼	Substituted.	Dewar, A. L. & Co.
	100	223½		Brewster, E. L. & Co.
	50	221⅞		McClellan, Geo. A.
	50	221⅞		Wright, Geo. E. & Co.
	50	221⅞		Gage.
	50	221½		Wilson & Sturges.
	50	222		Frank, F. G. & Bro.
	350	223		Hackney, H. C.
	50	222		Lobdell & Farwell.
Balance 1,250 sold.				

That the settlement or substitution sheet furnished to Jamieson & Co. by the clearing-house of the stock exchange, as the result and settlement between Jamieson & Co. and the other members of the stock exchange, of these transactions—omitting that part which refers to transactions in other stocks—was as follows:

CHICAGO, *July* 29, 1898.

We have settled all trades on your sheet this day, with the following exceptions, which have been substituted:

82

Bought.	Sold.	Stock.	Price.	Substitution.
	50 M.	M.	217½	Knight, Donnelley & Co.
	150	"	"	Durham, Albert.

2nd Account.

CHICAGO, *July* 29, 1896.

We have settled all trades on your sheet this day, with the following exceptions, which have been substituted:

Bought.	Sold.	Stock.	Price.	Substitution.
150		M.	221⅞	Schwartz, Dupee & Co.
600		"	"	Wise, Henry.

That the purchases and sales by Jamieson & Co., on behalf of different customers who employed them, of Diamond Match stock, on the Chicago stock exchange, on July 29, 1896, with the names of the other members of the stock exchange with whom the transactions were had, were as follows:

JAMIESON & CO.

Bo't.	Sold.	Price.	July acc't.	Broker.
	50	Substitution.		Knight, Donnelley & Co.
	150	Substitution.		Durham, Albert.
	100	217		Slaughter, A. O. & Co.
Balance,	300	delivered July 31.		
150		Substitution.	Aug. acc't.	Schwartz, Dupee & Co.
600		Substitution.		Wise, Henry.

Balance 750 bought.

That the purchases and sales of Schwartz, Dupee & Co., of Diamond Match stock, on the Chicago stock exchange, on behalf of the various customers who employed them, on the same day, July 29th, were as follows:

83 SCHWARTZ, DUPEE & CO.

Bo't.	Sold.	Price.	Aug. acc't.	Broker.
	50	221⅞	Substituted.	Brewster, E. L. & Co.
	1,050	221⅞	Substituted.	Lobdell & Farwell.
	150	221⅞	Substituted.	Jamieson & Co.
	100	222		Raymond, Pynchon & Co.
	50	222		Frank, F. G. & Bro.
50		222¼		Brewster, E. L. & Co.
50		222¾		Peters, U. G. & Co.
50		223¼		Wilson & Sturges.
50		223½		Brewster, E. L. & Co.
100		223½		Hackney, H. C.
	1,400			
300	300			
Balance,	1,100	sold.		

That the settlement or substitution sheet furnished to Jamieson & Company by the clearing-house of the stock exchange, as the result and settlement between Jamieson & Company and the other members of the stock exchange, of these transactions—omitting that part which refers to transactions in other stocks—was as follows:

CHICAGO, *July* 30, 1896.

We have settled all trades on your sheet this day, with the following exceptions, which have been substituted:

Bought.	Sold.	Stock.	Price.	Substitution.
300		M.	217¾	Raymond, Pynchon & Co

2nd Account.

CHICAGO, *July* 30, 1896.

We have settled all trades on your sheet this day, with the follo ing exceptions, which have been substituted:

Bought.	Sold.	Stock.	Price.	Substitution.
50		M.	222⅝	Schwartz, Dupee & C
700		"	"	Brewster, E. L. & Co.

84 That the purchases and sales by Jamieson & Co., on beh of different customers who employed them of Diamond Mat stock, on the Chicago stock exchange, on July 30, 1896, with t names of the other members of the stock exchange with whom t transactions were had, were as follows:

JAMIESON & CO.

Bo't.	Sold.	Price.	Aug. acc't.	Broker.
50			Substitution.	Schwartz, Dupee &
700			Substitution.	Brewster, E. L. & C
50		224		Chapin & Gaylord.
50		223¾		McClellan, Geo. A.
Balance, 850 bought.				

That the purchases and sales of Schwartz, Dupee & Co., of D mond Match stock, on the Chicago stock exchange, on behalf of t various customers who employed them, on the same day, Ju 30th, were as follows:

SCHWARTZ, DUPEE & CO.

Bo't.	Sold.	Price.	Aug. acc't.	Broker.
	1,050	222⅝	Substituted.	Lobdell & Farw
	50	222⅝	Substituted.	Jamieson & Co.
Balance,	1,100 sold.			

That the settlement or substitution sheet furnished to Jamieson & Co. by the clearing-house of the stock exchange, as the result and settlement between Jamieson & Co. and the other members of the stock exchange, of these transactions—omitting that part which refers to transactions in other stocks—was as follows:

CHICAGO, *July* 31, 1896.

We have settled all trades on your sheet this day, with the following exceptions, which have been substituted:

Bo't.	Sold.	Stock.	Price.	Substitution.
650		M.	222	Baldwin, Farnum & Co.
200		"	"	Chapin & Gaylord.

That the purchases and sales by Jamieson & Co. on behalf of different customers who employed them, of Diamond Match stock, on the Chicago stock exchange, on July 31, 1896, with the names
85 of the other members of the stock exchange, with whom the transactions were had, were as follows:

JAMIESON & CO.

Bo't.	Sold.	Price.	Aug. acc't.	Broker.
650			Substitution.	Baldwin, Farnum & Co.
200			Substitution.	Chapin & Gaylord.
Balance,	850 bought.			

That the purchases and sales of Schwartz, Dupee & Co., of Diamond Match stock, on the Chicago stock exchange, on behalf of the various customers who employed them, on the same day, July 31st, were as follows:

SCHWARTZ, DUPEE & CO.

Bo't.	Sold.	Price.	Aug. acc't.	Broker.
	700	222	Substituted.	Frank, F. G. & Bro.
	400	222	Substituted.	Wilson & Sturges.
Balance,	1,100 sold.			

That the settlement or substitution sheet furnished to Jamieson & Co. by the clearing-house of the stock exchange, as the result and settlement between Jamieson & Co. and the other members of the stock exchange, of these transactions—omitting that part which refers to transactions in other stocks—was as follows:

CHICAGO, *Aug.* 1, 1896.

We have settled all trades on your sheet this day, with the following exceptions, which have been substituted:

Bo't.	Sold.	Stock.	Price.	Substitution.
200	.....	M.	222	Adsit, C. C.
600	.....	"	222	Baldwin, Farnum & Co.
50	.....	"	"	Schwartz, Dupee & Co.

That the purchases and sales by Jamieson & Co., on behalf of different customers who employed them, of Diamond Match stock, on the Chicago stock exchange, on August 1, 1896, with the names of the other members of the stock exchange with whom the transactions were had, were as follows:

86 JAMIESON & Co.

Bo't.	Sold.	Price.		Broker.
200			Substitution.	Adsit, C. C.
600			Substitution.	Baldwin, Farnum & Co.
50			Substitution.	Schwartz, Dupee & Co.
100		222	Substitution.	Adsit, C. C.
200		222		Slaughter, A. O. & Co.

Balance, 1,150 bought.

That the purchases and sales of Schwartz, Dupee & Co., of Diamond Match stock, on the Chicago stock exchange, on behalf of the various customers who employed them, on the same day, August 1st, were as follows:

Sheets must be in at 9:45 a. m.
Certified Checks for differences and for margins must be handed in before 10:15 a. m.; Saturdays at 9:45 a. m.

NAMES	PAY	COLLECT	W C St R R		N C St R R		Diamond Mt	
			Bot	Sold	Bot	Sold	Bot	Sold
Adsit, Chas. C.	175		700				300	
Adsit, J. M.								
Baker, Alfred L.	112 50				300			
Baldwin, Farnum & Co.							600	
Banta, C. V., Jr.								
Beckwith, W. L.								
Breese & Cummings								
Brewster, E. L. & Co.								
Cahn, B. R.								
Chapin & Gaylord	2525		1200		100			
Collins, Wm. R.								
Counselman & Day	306 25		1000		150			
Counselman, W. & Co.								
Crawford, Chas.								
Dewar, A. L. & Co.								
Durham, Albert								
Evans, W. N.								
Fleming, M. F.								
Farrington, Geo. E. & Co.								
Foreman Bros.	206 25				550			
Frank, F. G. & Bro.								
Hackney, H. C.								
Hammond, C. G. & Co.	262 50		1050					
Hattermann, Carl								
Henrotin, Chas.								
Herrick, E. Walter								
Hunt, E. S.								
Herbst, Herman								
Horton Bros.								
Hubbard, Whipple & Co.								
Jones, G. E.								
Jamieson & Co.								
King, Alward & Co.	112 50		450					
Kitchen, John B.								
Knight, Donnelley & Co.								
Lamb, B. B.	1425		450					
Lobdell & Farwell								
Lowe, H. E. & Co.								
McClellan, Geo. A.								
McGrath, Chas. H.								
McGurren, Henry								
McIntire, Paul G.								
Meyer, C. B.								
Miller, L. D.								
Norton, E.								
Polack, A. M.								
Peters, R. A.				300				
Peters, U. G. & Co.								
Ramsay & Co.								
Raymond, Pynchon & Co.								
Shields, L. B.								
Spencer & Macdonald								
Slaughter, A. O. & Co.	187 50		750				200	
Townsend, J. J.								
Wrenn, J. H. & Co.	612 50		2450					
Wasmansdorff, Wm. G.								
Watriss, F. H.								
Welch, W. M.								
Weed, Wm. F.								
Wheeler, A. W.								
Whiton, L. K.								
Whyland, C. A.								
Wilson & Sturges								
Wollenberger, H. & Co.								
Wrenn, W. B.								
Wright, Geo. E. & Co.								
Wise, Henry								
Winslow	75		300					
Schwartz, D. & Co.							50	
	6000 00		8350	300	1100		1150	

Statement of Jamieson & Co. to the

Chicago Stock Exchange, Clearing Department.

Chicago, August 3, 1896.

Exhibit. Statement Jamieson & Co.

R R Sold	Diamond Mt Bot	Diamond Mt Sold	Lake St Elev R Co Bot	Lake St Elev R Co Sold	Lake St Elev Trust Ctfs Bot	Lake St Elev Trust Ctfs Sold	Straw Bd Bot	Straw Bd Sold	N Y Bis Co Bot	N Y Bis Co Sold	C & C C & D C Bot	C & C C & D C Sold	Mil & C B & M Co Com Bot	Mil & C B & M Co Com Sold	Mil & C B & M Co pfd Bot	Mil & C B & M Co pfd Sold	S S C Line Bot	S S C Line Sold	B & M Co Bot	B & M Co Sold	B&MCo pfd Bot	B&MCo pfd Sold	P & P Co Bot	P & P Co Sold	P & P pfd Bot	P & P pfd Sold	Chi Gas Bot	Chi Gas Sold	Int Pack Co Bot	Int Pack Co Sold	INT PACK Co pfd Bot	INT PACK Co pfd Sold
	300								50																							
	600																															
									1000																							
			1250						500																							
									100																							
									50																							
											Copy.																					
			750																													
	200																															
	50																															
	1150		2000						700																							

Ef. 87-88.

Henry Clews, et al. vs. Malcolm McN. Jamieson } No 2445

Chicago Stock Exchange Clearing House Rules.

THE ACCOUNT.

Exhibit. Rules.

SECTION 1.—Under the following regulations transactions may be made for "the account," in any Securities listed for that purpose dealt in at the Exchange.

SEC. 2.—Deliveries of cash stock on transactions for "the account" shall be made on the last day of each month. Provided, however, should the last day of any month occur on a holiday or on a day when the Exchange is closed for business, then in that case deliveries shall be made on the first business day preceding.

SEC. 3.—All purchases and sales for "the account" shall be entered upon the blanks furnished by the manager selected for that purpose, and said blanks properly filled out, balanced, accompanied by a proof sheet and signed, must be delivered to said manager before 9:45 a. m. It shall be the duty of the manager to compare and examine the statements rendered, and to report should any errors be found to the parties making such errors, before 12 m., by written notice, which must be called for at the manager's office. Parties in error must at once proceed to adjust the same and correct their statements. All balances due from the members as shown by the statements shall be paid by certified check drawn to the order of the bank designated for that purpose and delivered to the manager before 10:15 a. m. the same day, excepting on Saturdays, when the balance must be paid before 9:45 a. m.

SEC. 4.—On balances due to members as shown by the statements, a draft for the amount payable to their own order shall be drawn upon the bank designated for that purpose and delivered to the manager before 10:15 a. m. (except on Saturday). The manager shall cause said draft, if correct, to be accepted by said bank and returned to the parties entitled thereto at the manager's office.

SEC. 5.—On or before 9:45 a. m. parties who have not borrowed or loaned their stock balances for "the account" shall extend said balances on their statements at the closing bid price, designated as short or long, and shall request the manager in writing to borrow or loan said stock balances for their account and risk at the closing bid price. Notice that such loans have been made and the names of the parties thereto will be delivered at the manager's office on or before 2 p. m. Loans made by the manager are for one day only, unless renewed between members.

SEC. 6.—Stock balances as shown by the statements rendered for cash settling days must be delivered and paid for at the closing bid price of the previous day, as per manager's notices, before 1:30 p. m. Provided, however, if satisfactory evidence is shown the clearing house committee that the cash stock is on hand in New York, or in transit for Chicago, three days' grace shall be given the seller to make the delivery, with interest, failing in which the clearing house committee shall cause to be purchased for account of delinquent said stock in whichever market in their judgment seems best; and the party so failing to deliver shall be held responsible for all loss or damage arising therefrom, but when a failure to receive or deliver occurs, nothing in these notifications shall be construed to relieve the last contracting parties to the transaction from their liabilities to each other.

SEC. 7.—Whenever a member fails to pay the balance due on his statement by 10:15 a. m. (except on Saturday), the manager shall notify the presiding officer of the Exchange, whose duty it shall be to forthwith cause the stock balances, as shown by the statement of the delinquent, to be bought in or sold out under the rules as the case may be, and assess the parties in interest on the statement pro rata. In case any member owes an additional amount caused by errors, disputes or assessments, said amount shall be paid within one hour from the time of notification of the same, otherwise the party will be considered as having failed and be treated accordingly.

SEC. 8.—Whenever a member is unable to meet his contracts on transactions made for "the account" he shall make a statement of his transactions, to be audited that day, and deliver it to the manager or presiding officer of the Exchange.

SEC. 9.—The manager, or any assistants employed by him in the manager's office, are positively prohibited from receiving any securities or currency or any other evidences of value, except the checks and drafts hereinbefore mentioned in these rules.

SEC. 10.—The same rules as to notice, time and place that govern defaults in other contracts shall apply to transactions for "the account."

SEC. 11.—Neither the Exchange nor any of its members (except those making the errors), the manager or any assistants employed by him, shall be responsible for any errors made in the statements to the manager, but the errors must be settled and adjusted at once between the members making said errors when notified by the manager to do so. The manager shall report any neglect or refusal to comply with these rules to the presiding officer of the Exchange.

SEC. 12.—The margin to be deposited on stocks traded in the Clearing House shall be as follows:

On stocks selling under	$ 50	per share	the margin shall be	$ 5	per share.					
	50 to 100	"	"	"	"	"	"	10	"	"
	100 " 150	"	"	"	"	"	"	15	"	"
	150 " 200	"	"	"	"	"	"	20	"	"
	200 and over	"	"	"	"	"	"	25	"	"

SEC. 13.—Margins deposited on trades in the Clearing House shall be considered as a margin or as a part of same under Section 1 of Article XVI of the By-Laws of the Stock Exchange. All such margins to be deposited in the Clearing House.

SEC. 14.—The clearing of trades and money is not completed until the substitutions are all made and notice posted to that effect by the manager of the Clearing House.

SEC. 15.—The brokers have the party they may trade with or party re-

House shall be as follows:

On stocks selling under	$ 50	per share	the margin shall be	$ 5	per share.					
50 to	100	"	"	"	"	"	"	10	"	"
100 "	150	"	"	"	"	"	"	15	"	"
150 "	200	"	"	"	"	"	"	20	"	"
200 and over		"	"	"	"	"	"	25	"	"

SEC. 13.—Margins deposited on trades in the Clearing House shall be considered as a margin or as a part of same under Section 1 of Article XVI of the By-Laws of the Stock Exchange. All such margins to be deposited in the Clearing House.

SEC. 14.—The clearing of trades and money is not completed until the substitutions are all made and notice posted to that effect by the manager of the Clearing House.

SEC. 15.—The brokers have the party they may trade with or party received from the Clearing House on the substitution of the day before, in case of any failures between the hours the sheets are put in the Clearing House (9:45 a. m.) and the time the notice is posted that the substitutions are ready for that day.

SEC. 16.—In the event of the announcement of the failure of any member to meet his contracts, all stocks bought in or sold out for him as "account" stock shall be settled outside of the Clearing House, and only such stocks as appear on the substitution sheet of the day of the failure shall be allowed to clear on the Clearing House sheet of the following morning.

SEC. 17.—When any member fails to execute any contracts required of him by the Clearing House, the margin checks deposited by such member for the protection of other members contracting with him through the Clearing House, shall be held first for that special purpose, and after satisfying the claims of such members to the extent of the margin rule of the Clearing House, the balance, if any, shall be held for a period not exceeding ten days as a trust fund for a pro rata distribution among other creditors who are members of the Chicago Stock Exchange.

Cameron, Amberg & Co., printers and stationers, Chicago.

SCHWARTZ, DUPEE & CO.

Bo't.	Sold.	Price.		Broker.
	50	222	Substituted.	Jamieson & Co.
	1,050	222	Substituted.	Raymond, Pynchon & Co.
	50	222		Wilson & Sturges.
Balance,	1,150 sold.			

That the settlement or substitution sheet furnished to Jamieson & Co. by the clearing-house of the stock exchange, as the result and settlement between Jamieson & Co. and the other members of the stock exchange, of these transactions—omitting that part which refers to transactions in other stocks—was as follows:

CHICAGO, *Aug.* 3, 1896.

We have settled all trades on your sheet this day, with the following exceptions, which have been substituted:

Bought.	Sold.	Price.		Substitution.
1,150		M.	222	Schwartz, Dupee & Co.

That the clearing-house sheet which Jamieson & Co. put into the clearing-house on August 3, 1896, and which covered, among other transactions, those in Diamond Match above referred to, was as follows, and a clearing-house sheet of this form was put into the clearing-house by every member of the stock exchange who had dealings on those days, on each of the days above named, containing the transactions of the preceding day:

(Here follows statement of Jamieson & Co. marked pp. 87, 88.)

89 That the 500 shares sold July 25, 1896, by Schwartz, Dupee & Company, for the "August account" *was* sold for the account of Clews & Company, the complainants; that 200 shares of the 350 shares, sold July 27, 1896, by Schwartz, Dupee & Company, for the "August account," were also sold on account of complainants; that all of the other sales made by Schwartz, Dupee & Company, for the "August account," were made on behalf of other clients than the complainants; that the 750 shares sold by Schwartz, Dupee & Company, on July 28, 1896, were sold for four different clients of Schwartz, Dupee & Company; for one to the amount of 50 shares, for another to the amount of 300 shares, for another to the amount

of 350 shares, and for another to the amount of 50 shares. That the client for whom Schwartz, Dupee & Company bought the 350 shares on July 27th is the same person for whom they sold 350 shares on July 28th, and who sold in order to close his purchase of July 27th. That the client for whom Schwartz, Dupee & Company sold 300 shares on July 28th is the same person for whom Schwartz, Dupee & Company bought 300 shares on July 29th, and said purchase of July 29th was made to cover said person's sale of July 28th.

That the transactions heretofore set out in this stipulation of purchase and sale of Schwartz, Dupee & Company, Jamieson & Company and the other brokers whose names are stated, with the exception of those transactions which are marked as substitutions, were had by the brokers on behalf of different clients or principals whom they represented, and those transactions, so far as the different principals are concerned, were not settled or canceled by any of the substitutions, nor by any of the settlements between the brokers, except so far as where one client or principal of a broker was, through such broker, both a purchaser and a seller.

In other words, the settlements by substitutions or otherwise through the clearing-house were merely settlements between the members of the stock exchange, and were not settlements or cancellations of the contracts between the principals whom the brokers represented and the brokers themselves, except where the same broker had both purchased and sold for the same client.

LOWDEN, ESTABROOK & DAVIS,
Sol'rs for Complainants.
TENNEY, McCONNELL, COFFEEN & HARDING,
Solicitors for Jamieson, Nickerson, & Billings.
CHESTER M. DAWES,
Sol'r for Various Defendants — Schwartz, Dupee & Company.

(Endorsed:) Filed Apr. 25, 1898. S. W. Burnham, clerk.

90 Afterwards, to wit: on the eleventh day of May, 1898, in the December term of said court, 1897, in the record of proceedings thereof in said entitled cause, before the Hon. Peter S. Grosscup, district judge, appears the following entry, to wit:

Order Setting Case for Hearing.

Order.

Circuit Court of the United States, Northern District of Illinois, Northern Division.

WEDNESDAY, *May* 11, 1898.

Present: Hon. Peter S. Grosscup, district judge.

HENRY CLEWS ET AL.
vs. } 24261.
MALCOLM JAMIESON ET AL.

It is ordered by the court that this cause be set down for final hearing on pleadings and proofs on June 3, 1898.

Afterwards, to wit: on the twentieth day of May, 1898, in the December term of said court, 1897, in the record of proceedings thereof in said entitled cause, before the Hon. Peter S. Grosscup, district judge, appears the following entry, to wit:

Order Substituting Solicitors.

Order.

Circuit Court of the United States, Northern District of Illinois, Northern Division.

FRIDAY, *May* 20, 1898.

Present: Hon. Peter S. Grosscup, district judge.

HENRY CLEWS ET AL.
vs. } 24261.
MALCOLM M. JAMIESON ET AL.

Now come Estabrook & Davis, solicitors for complainants, and withdraw their appearance as such solicitors, and the appearance of Lowden, Estabrook & Davis is entered in the place and stead of Estabrook & Davis, withdrawn.

91 Afterwards, to wit: on the third day of June, 1898, in the December term of said court, 1897, in the record of proceedings thereof in said entitled cause, before the Hon. Peter S. Grosscup, district judge, appears the following entry, to wit:

Hearing, June 3, 1898.

Order.

Circuit Court of the United States, Northern District of Illinois, Northern Division.

FRIDAY, *June* 3, 1898.

Present: Hon. Peter S. Grosscup, district judge.

HENRY CLEWS ET AL.
vs.
MALCOLM JAMIESON ET AL. } 24261.

Now come the parties by their solicitors. Now this cause comes on to be heard on pleadings and proofs and on exceptions of defendants to the report of the master in chancery. The court, after hearing the arguments of counsel, takes the matter under advisement.

Afterwards, to wit: on the fifth day of July, 1898, there was filed in the clerk's office of said court a certain opinion by Judge Grosscup, which said opinion is in the words and figures following, to wit:

Opinion by Judge Grosscup. Filed July 5, 1898.

Opinion.

United States Circuit Court, Northern District of Illinois, Northern Division.

HENRY CLEWS ET AL.
vs.
MALCOLM M. JAMIESON ET AL.

GROSSCUP, *J.:*

The bill in this case is brought to charge a so-called trust fund, in the hands of the Chicago stock exchange, with the payment of a certain sum of money said to be due to the complainants
92 from the defendants. The record presents many interesting questions, but the facts essential to the disposition of the case can be briefly stated as follows:

The complainants, residents of the city of New York, in July, 1896, through their brokers, Schwartz, Dupee & Company, of the city of Chicago, sold upon the Chicago stock exchange, for the July account, five hundred shares of the Diamond Match Company's stock at $221⅛ per share, and subsequently, two hundred shares at 221¼. Later in the month, at the instance of the complainants, these transactions were changed to the August account at 229.

The purchase and sale was on both sides probably through brokers, whose respective principals remained undisclosed, either to the broker or principal on the opposite side of the transactions.

Under the rules and practice of the exchange the method of doing business between the brokers is stated to be as follows:

"At ten o'clock there is an official call at which the secretary and manager call all the stocks, bonds and securities on the official printed list; and as this call progresses, any member wishing to buy, or sell, bids thereon, and the record is made of the transaction; after which there is an irregular call, which closes at half past one, when the manager of the clearing-house announces the clearing-house or settlement prices for the day, which are the closing prices on the exchange for the respective stocks and securities. The manager then substitutes trades and sends out cards to all buying or selling on the amount for the current month, or for the next month; that on the 25th of the month, and thereafter until the second day before the end of the month, two calls are made, one for the current month and one for the next ensuing month, and this is done to allow those who wish to do so to change their accounts over to the next month. That this substitution was made by the clearing department by a system somewhat similar to that employed by the clearing-house for banks; that is, where a broker has purchasd and sold during the day the same amount of the same kind of stocks or bonds, his account is balanced by the clearing department, and all margins deposited by such broker may be withdrawn; that when sales and purchases are made by different brokers, one buying and the other selling, the same kind of stocks or bonds, a substitution is made by the manager of the clearing department, by which it appears that the broker selling has sold such stocks, not to the person to whom it was originally sold, but to a person or persons other than those to whom such sales were originally
93 made, and who originally bought of some one else, and that a broker purchasing stock has purchased from some broker other than the broker from whom he originally purchased the same; for instance, if A had sold 100 shares of stock to X, and B has bought the same amount of the same stock from Y, and X's and Y's accounts are balanced by other transactions, the substitution would make it appear that A, and the names of the parties with whom the original transactions had actually been made by A and B, would not appear on the clearing-house sheet; that in the transactions on said exchange it is then customary for the parties thus substituted and brought into the relation of buyer and seller with each other by the manager, to assent to the new regulations thus formed, and to confirm the transactions thus adjusted by the manager, and to put up the margins required by the rules, unless margins are already on deposit in the exchange, in which case they are transferred by the manager to the new account."

Pursuant to this method the firm of Schwartz, Dupee & Company on the 3d day of August, cleared its transactions with the other brokers, resulting in eleven hundred and fifty shares of Diamond Match stock, the sellers of which were represented by Schwartz, Dupee & Company being so transferred; that the defendants stood, by a substitution as to Schwartz, Dupee & Company, the purchasers, at 222. It is clear that, thereafter, as between Schwartz, Dupee &

Company and the defendants, there was such privity of contract that the defendants were under obligation to take of Schwartz, Dupee & Company, during the month, eleven hundred and fifty shares of the stock in question at 222.

On the same day, August 3d, the stock exchange was, by order of its officers, closed, and remained closed until the 5th of November following. On the last day of the month Schwartz, Dupee & Company tendered to the defendants certificates for the eleven hundred and fifty shares of the Diamond Match Company stock, which certificates the defendants refused to accept. Subsequently, in September, after due notice, Schwartz, Dupee & Company sold these shares at public auction to the highest bidder, realizing therefor the sum of one hundred and thirty dollars per share. This resulted in a loss to them of their principals of about ninety-two dollars per share.

Under the rules of the stock exchange, 10 per cent. par value of the stock dealt in had been deposited with the stock exchange as a fund in guaranty of the transactions. The object of the
94 present suit is to recover the difference between the contract and the selling price of these shares, and to subject this guaranty fund, amounting to seven thousand dollars, to the payment, *pro tanto*, of such loss.

There can be no question that there came into existence by the transactions stated a contract, whereby, primarily between Schwartz, Dupee & Company and the defendants, whereby the latter were obliged to purchase of the former, and the former were obliged to sell to the latter, during the month, seven hundred shares of this stock at the price of 222 per share.

Nor can there be any doubt that the undisclosed principals of either of these parties were entitled to step into the place of these respective brokers, and in their own name, and for their own benefit, insist upon the enforcement of the contract according to its terms. Clearly, under the rules of the exchange, each of the brokers bound himself, both to the other broker and to the principal whom the other broker represented, to carry out the terms of the cont-act.

The only question is whether the complainants were parties principal to the contract between Schwartz, Dupee & Company and the defendants. The evidence discloses that their authority to the brokers was to sell seven hundred shares of this stock at 229, and while the authority to sell for more than this might be implied, authority to sell for less could certainly not be. They were entitled, under their contract with Schwartz, Dupee & Company, to a purchaser at 229, or more; they were bound to no sale at a figure less. Neither Schwartz, Dupee & Company, nor any persons with whom that firm had contracted, could have compelled the complainants to deliver the stock at a price less than 229.

But the contract between Schwartz, Dupee & Company and the defendants was for the sale of seven hundred shares at 222. Under the contract between the brokers, the defendants could have demanded a conveyance at 222. But of whom could they have made

such demand? Certainly not from the complainants. Their contract was for 229, and no less.

The devices of the exchange for clearing and counterbalancing accounts between brokers could not, without their consent, change so essential a term of the complainants' sale. It cannot be that authority from a principal to sell at 229 can, without his conscious assent, be transformed into authority to sell at 222. The original understanding that the sale should be made under the rules and practice of the stock exchange cannot be interpreted to give such elasticity to the all-important feature of price. Who would
95 deal on the exchange as principal, if it were understood that the prices named had no fixity—that the obligation might be one thing today, and another totally different thing tomorrow? While the substitutions, resulting in prices unquestionably different from those originally authorized bind the brokers participating, they do not, in the absence of assent, reach over so as to change the contract rights of the principals. To hold otherwise would be to abolish, by judicial pronouncement, the authority on the faith and stability on which every transaction on the exchange is grounded.

But if the defendants, under the substitution, could not hold the complainants as principals to the contract for the sale at 222, then for want of mutuality the complainants are in no position to hold the defendants. There is, indeed, no identity of contract between the one the complainants authorized and the one entered into between Schwartz, Dupee & Company and the defendants. That the complainants now choose to accept it is of no significance; the legal fact remains that they are not so bound, and not being so bound, the defendants, on their part, are not legally bound.

Whatever legal obligation the defendants owe is, under the contract of substitution, to Schwartz, Dupee & Company alone. Between the complainants and the defendants there is no privity, and, therefore, no enforceable obligation.

For the foregoing reasons the bill must be dismissed.

(Endorsed:) Filed July 5, 1898. S. W. Burnham, clerk.

96 Afterwards, to wit: on the eleventh day of July, in the July term of said court, 1898, in the record of proceedings thereof in said entitled cause, before the Hon. Peter S. Grosscup, district judge, appears the following entry, to wit:

Judgment, July 11, 1898.

Circuit Court of the United States, Northern District of Illinois, Northern Division.

MONDAY, *July* 11, 1898.

Present: Hon. Peter S. Grosscup, district judge.

HENRY CLEWS, CHARLES M. FOSTER, and JAMES B. CLEWS
vs.
MALCOLM M. JAMIESON, ROLAND C. NICKERSON, HARRY F. Billings, Edwin G. Foreman, Charles Henrotin, A. W. Wheeler, J. J. Townsend, S. B. Chapin, George F. Wright, H. Herbst, Henry C. Hackney, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William N. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorf, George A. McClellan, A. L. Dewar, Gustavus A. Schwartz, John Dupee, John W. Conley, and Isaac J. Bloom. } 24261.

The court having considered and being now fully advised upon the motion for a rehearing upon petition filed, announces its opinion that said motion should be overruled and the exceptions to the master's report be sustained. It is thereupon considered and adjudged by the court that said motion for rehearing be and the same is hereby denied; that the exceptions to the master's report herein be and the same are hereby sustained, and the bill of complaint herein be and the same is hereby dismissed for want of equity at the costs of the complainant-, and that *exception* issue therefor.

97 Afterwards, to wit, on the twenty-third day of July, 1898, came the complainants in said entitled cause by their solicitors and filed in the clerk's office of said court their petition for appeal, which said petition for appeal is in the words and figures following, to wit:

Petition for Appeal. Filed July 23, 1898.

Petition for Appeal.

In the Circuit Court of the United States, Northern District of Illinois, Northern Division.

HENRY CLEWS, CHARLES M. FOSTER, and JAMES B. CLEWS
vs.
MALCOLM M. JAMIESON, ROLAND C. NICKERSON, HARRY F. BILLINGS, Edwin G. Foreman, Charles Henrotin, A. W. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, H. Herbst, Henry C. Hackney, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William V. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorf, George A. McClellan, A. L. Dewar, Gustavus A. Schwartz, John Dupee, John W. Conley, and Isaac J. Bloom.

The above-named complainants, Henry Clews, Charles M. Foster, and James B. Clews, conceiving themselves aggrieved by the order and decree entered herein on the 11th day of July, A. D. 1898, sustaining the exceptions of defendants, Malcolm M. Jamieson, Roland C. Nickerson, and Harry F. Billings, to the report of the master and dismissing the complainants' bill in the above-entitled proceedings, do hereby appeal from said order and decree to the United States circuit court of appeals for the seventh circuit, and they pray that their appeal may be allowed, and that a transcript of the record and proceedings, papers and evidence, upon which said order and
98 decree was made, duly authenticated, may be sent to the United States circuit court of appeals for the seventh circuit. And the said complainants file herewith their assignment of errors herein, and their bond for said appeal.

LOWDEN, ESTABROOK & DAVIS,
Solicitors for Complainants.

H. J. DAVIS, *Of Counsel.*

(Endorsed :) Filed Jul- 23, 1898. S. W. Burnham, clerk.

On the same day, to wit, the twenty-third day of July, 1898, came the complainants in said entitled cause by their solicitors and filed in the clerk's office of said court their assignment of errors, which said assignment of errors *are* in the words and figures following, to wit :

Assignment of Errors. Filed July 23, 1898.

Assignment of Errors.

In the United States Circuit Court of Appeals for the Seventh Circuit.

HENRY CLEWS, CHARLES M. FOSTER, and JAMES B. Clews
vs.
MALCOLM M. JAMIESON ET AL.
} Assignment of Errors.

The above-named complainants, Henry Clews, Charles M. Foster, and James B. Clews, say that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

First. The circuit court erred in sustaining the first exception of the defendants, Malcolm M. Jamieson, Roland C. Nickerson, and Harry F. Billings, to the report of E. B. Sherman, master in chancery.

Second. The circuit court erred in sustaining the second exception of defendants, Malcolm M. Jamieson, Roland C. Nickerson, and Harry F. Billings, to the report of E. B. Sherman, master in chancery.

Third. The circuit court erred in sustaining the third exception of defendants, Malcolm M. Jamieson, Roland C. Nickerson,
99 and Harry F. Billings, to the report of E. B. Sherman, master in chancery.

Fourth. The circuit court erred in holding and deciding that the contract entered into between the defendants, Schwartz, Dupee & Company and Jamieson & Company was not made by Schwartz, Dupee & Company on behalf of complainants.

Fifth. The court erred in holding and deciding that whatever legal obligations the defendants, Jamieson & Company owed under the contract entered into by them and Schwartz, Dupee & Company on August 3, 1896, they owed to Schwartz, Dupee & Company alone.

Sixth. The court erred in holding and deciding that the complainants were not equitably entitled to the money on deposit with the Chicago stock exchange, to secure the performance of the contract entered into between Schwartz, Dupee & Company and Jamieson & Company.

Seventh. The court erred in holding and deciding that the complainants were not in equity entitled to recover the proceeds of the contract entered into between Schwartz, Dupee & Company and Jamieson & Company on August 3, 1896, so far as it related to the sale of seven hundred shares of stock of the Diamond Match Company.

Eighth. The court erred in dismissing complainants' bill for want of equity.

Ninth. The court erred in denying complainants the relief prayed

for in their amended bill, and in refusing to enter a decree in favor of complainants directing the defendants, Malcolm M. Jamieson, Edwin G. Foreman, Charles Henrotin, A. W. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, H. Herbst, Henry C. Hackney, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William V. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, George A. McClellan and A. L. Dewar, constituting the governing committee of the Chicago stock exchange, to pay the complainants the amount of fourteen thousand dollars ($14,000) held by said governing committee in trust to secure the performance of the contract of August 3, 1896, between Schwartz, Dupee & Company and Jamieson & Company, so far as it related to the sale of seven hundred (700) shares of stock of the Diamond Match Company.

Tenth. The court erred in refusing to enter a decree in favor of complainants against the defendants, Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings for the payment by said
100 defendants of the amount of the damages sustained by complainants by reason of the failure of Jamieson Company to accept and pay for seven hundred (700) shares of stock of the Diamond Match Company under their contract with Schwartz, Dupee & Company of August 3, 1896.

Eleventh. The court erred in refusing to enter a decree in favor of the complainants against the defendants, Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings, for the sum of fifty-seven thousand four hundred dollars ($57,400), being the balance due from said defendants under their contract for the purchase of Diamond Match stock from Schwartz, Dupee & Company, the agents and brokers of complainants, in addition to the amount on deposit in the stock exchange.

Twelfth. The court erred in holding that under the evidence the complainants, as principals, were not in equity entitled to enforce the obligations of Jamieson & Company for the purchase of seven hundred (700) shares of stock of the Diamond Match Company, arising under the contract made by Jamieson & Company on August 3, 1896, with Schwartz, Dupee & Company, the agents and brokers of complainants.

Wherefore said complainants, Henry Clews, Charles M. Foster and James B. Clews, pray that the order and judgment of the said circuit court of the United States for the northern district of Illinois, northern division, be reversed, and that the said circuit court be directed to enter a decree for the complainants, as prayed for in their bill of complaint, and as recommended in the report of the master filed in said circuit court January 22, 1898.

LOWDEN, ESTABROOK & DAVIS,
Solicitors for Complainants and Appellants.

HERBERT J. DAVIS, *Of Counsel.*

(Endorsed:) Filed Jul- 23, 1898. S. W. Burnham, clerk.

101 On the same day, to wit, the twenty-third day of July, in the July term of said court, 1898, in the record of proceedings thereof in said entitled cause, before the Hon. Peter S. Grosscup, district judge, appears the following entry, to wit:

Order Allowing Appeal. Filed July 23, 1898.

Order allowing appeal.

July 23, 1898.

HENRY CLEWS, CHARLES M. FOSTER, and JAMES B. CLEWS
vs.
MALCOLM M. JAMIESON ET AL. } 24261.

Now come the complainants by their solicitors and present their petition for appeal to the United States circuit court of appeals for the seventh circuit from the order and decree entered herein on the 11th day of July, A. D. 1898, and also file their assignments of error.

The court having considered and being duly advised, it is ordered that said appeal be allowed upon the complainants filing a bond in the sum of five hundred dollars ($500) with surety to be approved by the court.

On the same day, to wit, the twenty-third day of July, 1898, came the complainants in said entitled cause as principals, and the United States Fidelity and Guaranty Company, a corporation, as surety, and filed in the clerk's office of said court a certain appeal bond, which said appeal bond is in the words and figures following, to wit:

Appeal Bond. Filed July 23, 1898.

Appeal bond.

In the Circuit Court of the United States, Northern District of Illinois, Northern Division.

HENRY CLEWS, CHARLES M. FOSTER, and JAMES B. CLEWS, Complainants,
vs.
MALCOLM M. JAMIESON ET AL., Defendants.

Appeal bond.

Know all men by these presents, that we, Henry Clews, Charles M. Foster, and James B. Clews, as principals, and The
102 United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland, as surety, are held and firmly bound unto Malcolm M. Jamieson, Roland C. Nickerson, Harry F. Billings, Edwin G. Foreman, Charles Henrotin, A. W. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, H. Herbst, Henry C. Hackney, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William

V. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, George McClellan, A. L. Dewar, Gustavus A. Schwartz, John Dupee, John W. Conley, and Isaac J. Bloom, in the sum of five hundred dollars ($500), for the payment of which well and truly to be made we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the fourteenth day of July, A. D. 1898.

Whereas, the above-named Henry Clews, Charles M. Foster, and James B. Clews, have appealed from the order and decree of the said court in the above-entitled suit to the United States circuit court of appeals for the seventh circuit to reverse the decree therein rendered by the said circuit court.

Now, therefore, the condition of this obligation is such that if the above-named Henry Clews, Charles M. Foster, and James B. Clews, shall prosecute said appeal to effect and answer all damages and costs, if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

[3-cents internal-revenue stamps.]

HENRY CLEWS, [SEAL.]
CHARLES M. FOSTER, [SEAL.]
JAMES B. CLEWS, [SEAL.]
By LOWDEN, ESTABROOK & DAVIS,
Their Attorneys and Solicitors.

[SEAL.] THE UNITED STATES FIDELITY AND GUARANTY COMPANY, [SEAL.]
By GEORGE D. WEBB,
Attorney-in-fact, Surety.

The above bond and the surety thereon approved by me this 23d day of July, A. D. 1898.

P. S. GROSSCUP, *Judge.*

(Endorsed:) Filed Jul- 23, 1898. S. W. Burnham, clerk.

103 And on the 22d day of January, 1898, there was filed in the office of the clerk of said court the report of said master, Elijah B. Sherman, of the proofs taken by him, which report is in words and figures as follows:

Index to Testimony.

In the Circuit Court of the United States for the Northern District of Illinois.

HENRY CLEWS ET AL.
vs.
M. M. JAMIESON ET AL. } 24261. In Chancery.

Testimony in behalf of complainants and defendants, taken, pursuant to an order of reference in said cause, before Elijah B. Sherman, a master in chancery of said court, commencing on the eighth day of June, 1897, and continuing from time to time, as hereinafter noted.

Present: Messrs. Estabrook & Davis, solicitors for complainants; Hon. S. P. McConnell, solicitor for defendants.

INDEX.

Complainants' Testimony.

	Direct.	Cross.	Redirect.	Recross.
H. F. Billings	1			
" (recalled)	23			
John W. Conley	9	14		
Walter Comstock	17			
" (recalled)	27			
Joseph R. Wilkins	31			
H. J. Davis	77			

COMPLAINANTS' EXHIBITS.

		Introduced.	Copied.
Exhibit 1.	Letter dated September 10, 1896, from Clews & Co. to Jamieson & Co.	1	2
" 2.	Letter September 9, 1896, to Jamieson & Co. from Schwartz, Dupee & Co.	3	3
104			
" 3.	Letter September 22, 1896, to Jamieson & Co. from Clews & Co.	4	5
" 4.	Letter September 23, 1896, to Jamieson & Co. from Schwartz, D. & Co.	6	6
" 5.	Substitution card	7	8
" 6.	Letter confirming sale	57	57
" 7.	Letter confirming purchase	58	58
	Statement as to messages sent and received between respective parties	..	24
	Stipulation of counsel as to messages introduced, and as to orders, the subject-matter of said messages	26	26

Exhibit 8.	Clearing-house sheet	29	30
" 9.	Clearing-house rules	41	72
" 10.	Section 3, clearing-house rules	46	72
" 11.	Resolution closing stock exchange	61	62
	Constitution, by-laws and rules of Chicago stock exchange	63	64
" 12.	Official record sales Diamond Match	62	
Exhibit 13.	Section 12 of clearing-house rules	63	75
" 14.	Notice of sale 700 shares Diamond Match stock	77	78
" 15.	Advertisement of sale in "Law Bulletin"	78	79
" 16.	Letter September 24, 1896, from Jamieson & Co. to Schwartz, D. & Co.	81	82
" 17.	Letter September 23, 1896, to Chicago stock exchange and governing committee from Schwartz, D. & Co.	82	82

105 *Defendants' Evidence.*

	Direct.	Cross.	Redirect.	Recross.
Frank N. Gage	84	87		
H. F. Billings	87	90		
Walter Comstock	98	99		

DEFENDANTS' EXHIBITS.

	Introduced.	Copied.
Exhibit 7 of complainants, *i. e.*, letter confirming purchase	91	
Exhibit 6 of complainants, *i. e.*, letter confirming sale	92	
Stipulation as to deposition of I. H. Wagener	94	94
Stipulation as to admitted facts and orders to Schwartz, D. & Co.	95	95
Stipulation as to settlement prices of Diamond M. Co. stock on Chicago stock exchange from November 5, 1896, to December 10, 1896	101	101
Stipulation as to claim of Schwartz, D. & Co. to $14,000 contributed to clearing-house	103	104

Circuit Court of the United States, Northern District of Illinois, Northern Division.

HENRY CLEWS ET AL.
vs.
M. M. JAMIESON ET AL.

JUNE 8, 1897.

Met pursuant to agreement.

Present: Messrs. Estabrook & Davis, solicitors for complainants, and Hon. S. P. McConnell, solicitor for defendants.

106 *Testimony of H. F. Billings.*

H. F. BILLINGS, a witness called on behalf of complainants, being first duly sworn, testified as follows:

Direct examination by Mr. DAVIS:

Q. Mr. Billings, you are one of the defendants?
A. Yes.
Q. And a member of the firm of Jamieson & Co.?
A. I am.
Q. Will you produce a letter signed Henry Clews & Company, by Estabrook & Davis, dated September 10, 1896?
A. I have it here (producing letter).
Q. That was received by you on or about September 10th, was it?
A. Yes.

Mr. DAVIS: This is offered in evidence as Complainants' Exhibit 1.

It is stipulated that this and all other letters may be copied into the record, the copy to have the same effect as the original, and the original retained by the owner.

EXHIBIT 1 TO TESTIMONY OF H. F. BILLINGS.

EXHIBIT 1.

SEPTEMBER 10, 1896.

Messrs. Jamieson & Company, No. 187 Dearborn street, Chicago.

DEAR SIRS: This is to notify you that on Tuesday, the 15th day of September, 1896, at one o'clock p. m., we shall offer for sale, at public auction, to the highest bidder for cash, at the judicial sales-rooms of the Chicago Real Estate Board, No. 57 Dearborn street, in the city of Chicago, county of Cook and State of Illinois, seven hundred (700) shares of stock of the Diamond Match Company, and at said time and place will sell the same to the highest bidder for cash. Said sale will be made for your benefit on account of your contracts with Schwartz, Dupee & Co. on the Chicago stock exchange for the purchase by you of said shares, in which contracts the said Schwartz, Dupee & Co. were acting as agents of the undersigned, said shares of stock having been tendered you by Schwartz, Dupee & Co. in fulfillment of said contracts on the 31st day of August, 1896.

You are further notified that should said stock at said sale sell for less than the amount due from you on said contracts we will look to you to settle the difference, and we will hold you responsible for any loss on account of said contracts.

107 The contracts of sale referred to herein are the same mentioned in the letter of Schwartz, Dupee & Co., accompanying this notice.

In the meantime we hold said stock ready for delivery to you upon payment of the amount due from you under said contracts of purchase.

Very truly yours, HENRY CLEWS & CO.,
By ESTABROOK & DAVIS,
Their Attorneys.

Q. Will you also produce a letter signed Schwartz, Dupee & Co., dated September 9, 1896?

A. Yes. (Producing letter.)

Mr. DAVIES: We will offer it in evidence as Complainants' Exhibit 2. It is as follows:

EXHIBIT 2 TO TESTIMONY OF H. F. BILLINGS.

CHICAGO, *September* 9, 1896.

Messrs. Jamieson & Co., 187 Dearborn street, Chicago, Illinois.

DEAR SIRS: On August 31, 1896, we tendered you seven hundred (700) shares of Diamond Match stock in settlement of sales made by us. The sales made were 500 shares July 25th, and 200 shares July 27, 1896, you being substituted through the clearing-house of the Chicago stock exchange August 3, 1896, as the purchaser of said stock.

This is to notify you that said sales were made by us as agents for Henry Clews & Co., of New York, who may rightfully take any proceedings to enforce the contracts for said sales, and who are authorized to make settlement thereof.

Very truly yours, SCHWARTZ, DUPEE & CO.

Q. That was received by you on September 10, was it not?

A. I couldn't say as to that—about that.

Q. Will you produce a letter, dated September 22, from Henry Clews & Co.?

A. By Estabrook & Davis?

Q. By Estabrook & Davis.

A. Yes, sir. (Producing letter.)

Q. This was received by you on September 22, was it not?

A. Well, about then.

Mr. DAVIS: We offer it in evidence as Complainants' Exhibit 3, as follows:

EXHIBIT 3 TO TESTIMONY OF H. F. BILLINGS.

SEPTEMBER 22, 1896.

Messrs. Jamieson & Company, Chicago, Illinois.

DEAR SIRS: Pursuant to our notice to you dated the 10th inst., which we personally left with Mr. Billings on the 11th, we have to inform you that on the 15th day of September we adjourned
108 the auction sale of the seven hundred (700) shares of stock of the Diamond Match Company until the 22nd day of September, 1896, at one o'clock p. m.

We sent out several hundred circulars to persons interested, and to such persons as we might reasonably suppose were interested, both of the original date fixed for the sale and of the date to which the sale was adjourned.

We today offered the stock for sale to the highest bidder and it was struck off at the price of one hundred and thirty dollars ($130) per share. The shares offered were the same ones tendered you by Schwartz, Dupee & Company on the 31st of August, as stated in their letter of the 9th inst.

This is to further notify you that we shall hold you liable for the difference between the price at which you purchased and the price for which the stock was sold at auction, and for all damages which we have sustained by reason of your failure to accept and pay for said stock.

Very truly yours, HENRY CLEWS & CO.,
By ESTABROOK & DAVIS."

Q. Produce the letter from Schwartz, Dupee & Co., dated September 23, 1896.

A. That is the one. (Producing letter.)

Q. That was also received about the time it was dated?

A. Yes.

Mr. DAVIS: This letter is introduced in evidence as Complainants' Exhibit 4, which is as follows:

EXHIBIT 4.

SEPTEMBER 23, 1896.

Messrs. Jamieson & Company, 187 Dearborn street, Chicago, Illinois.

DEAR SIRS: As the Chicago stock exchange has closed and it is uncertain when it will be opened, we have to request that you consent that the Chicago stock exchange pay to us the margins deposited on account of the sale of seven hundred (700) shares of the stock of the Diamond Match Company, sold by us for Henry Clews & Company, and purchased by you, according to the clearing-house sheet, of August 3d.

Upon receipt of the margins from the clearing-house the amount deposited by you, to wit: ten dollars per share, will be credited you on account of said purchase; without prejudice, of course, to the right of Henry Clews & Company to demand and recover from you any damages sustained by reason of your failure to accept and pay for said stock over and above the amount deposited by you to protect said sale.

Yours truly, SCHWARTZ, DUPEE & CO.

We concur in the above request, and upon receipt of said deposit by Schwartz, Dupee & Company, Jamieson & Company will be

credited with the amount of the deposit of Jamieson &
109 Company. We shall look, however, to Jamieson & Company to settle any damages over and above the amount of said credit.

HENRY CLEWS & CO.,
By ESTABROOK & DAVIS,
Their Att'ys.

Q. Will you produce the Chicago Stock Exchange clearing-house substitution sheet of August 3, 1896, showing substitutions made by the clearing-house on that day?

A. I have it here. (Producing card.)

Mr. DAVIS: We offer it in evidence and will read it into the record so far as it pertains to the issues.

Judge MCCONNELL: We object to the competency of that paper, and the relevancy of it.

Q. Where did you get this paper, Mr. Billings?

A. It was brought back by our boy from the stock exchange.

Q. Who issued that paper?

A. Any more than you see the heading, that is all.

Q. Is this one of the daily sheets issued by the manager of the clearing-house?

A. I don't know; it comes from the clearing-house; I presume so.

Q. Issued under the rules of the——

Judge MCCONNELL: We object; this is your witness—a leading question.

Mr. DAVIS: I think we are entitled to ask any sort of leading questions.

Judge MCCONNELL: Issued under the rules—it seems to me is calling upon this witness to express an opinion.

The WITNESS: I don't know as to that, you know.

Mr. DAVIS: I will offer it in evidence, and will afterwards introduce witnesses to prove the method of its issuance, as Complainants' Exhibit 5.

Judge MCCONNELL: I want my objection preserved as to the competency or relevancy of the testimony.

The MASTER: Let it be admitted subject to the objection.

EXHIBIT 5.

CHICAGO STOCK EXCHANGE,
CLEARING DEPARTMENT,
CHICAGO, *August* 3, 1896.

Jamieson:

We have settled all trades on your sheet this day with the following exceptions which have been substituted:

Bought.	Sold.	Stock.	Price.	Substitution.
1,150	....	M.	222	Schwartz.

Cross-examination waived.

JUNE 8, 1897.

110 *Testimony of John W. Conley.*

JOHN W. CONLEY, a witness called on behalf of complainants, being first duly sworn, testified as follows:

Direct examination by Mr. DAVIS:

Q. You are a member of the firm of Schwartz, Dupee & Company?

A. Yes, sir.

Q. Do you know the firm of Jamieson & Company?

A. I know them as a firm, yes, sir.

Q. And did you in August, 1896?

A. Yes, sir.

Q. Mr. Conley, did you, in behalf of Schwartz, Dupee & Company, on August 31, 1896, have any business with the firm of Jamieson & Company touching the delivery of shares of stock of the Diamond Match Company?

A. I did.

Q. If so, state what that business was.

A. I called upon the firm of Jamieson & Company, on August 31 last, at about 1.20 p. m., and made a tender to them of 1,150 shares of Diamond Match; as I understood at the time, one of the members of the firm——

Judge MCCONNELL: We will have to object to what he understood at the time.

The MASTER: State what was said and what took place, please.

A. I first went into the private office of Jamieson & Company and inquired for Mr. Jamieson; some one directed me to him, and I told him I desired to deliver 1,150 shares of Diamond Match; he referred me to the office outside. I went out there and called at the delivery—called at the desk of the stock clerk, told him that I was there to deliver 1,150 shares of Diamond Match. He says, Well, let me see the stock. Well, I said to him, I have the stock here in my possession. He says, I want the numbers, I want to see the stock. I passed the stock in to him, he examined it very carefully, seemed to make some memorandum of something in relation to it, I don't know what, and he pushed the stock back and said that he would not receive the stock because the parties for whom he had bought would not receive it from him. I took the stock and went back to the office.

Q. What was that stock that you tendered to them then?

A. It was 1,150 shares of Diamond Match.

Q. They were certificates of stock?

A. Certificates of stock.

111 Q. How long had you dealt in Diamond Match stock at that time?

A. O, that would be very hard for me to state.

Q. Well, for some time before that?

A. O, yes.

Q. You were familiar with their stock certificates, were you, issued by the company?

A. Yes.

Q. Have you the numbers of the certificates you tendered at that time?

A. I have.

Q. What were the numbers?

A. Well, if you will allow me, here is a memorandum that was made out at the time from the number of shares and the number of the certificates.

Q. You can give the number of the shares, can you?

A. I can.

Q. That is, the certificates of shares?

A. Yes.

Q. Give them.

A. Well, there was A 680, 100 shares; A 681, 100 shares; A 682, 100 shares; A 683, 100 shares; A 684, 100 shares; A 685, 100 shares; A 686, 100 shares; A 687, 100 shares; A 688, 100 shares; A 689, 100 shares; 9096, 50 shares; 9097, 50 shares; 9098, 50 shares.

Q. Do you know now in whose names those certificates stood?

A. Well, we have no memorandum of that.

Q. You didn't make a memorandum?

A. I think—no, you don't allow me to state that. I can't state exactly.

Q. From your memory can you tell?

A. From my memory——

Judge McConnell: We object.

A. Well, to the best of my judgment and belief.

Judge McConnell: We don't know what you mean; are you referring to the name that appeared on the face of the certificate?

Mr. Davis: Yes.

Judge McConnell: You don't say that; you said in whose names did they stand; that would go to the question how they stood on the books of the company.

Q. Do you know whose name appeared on those certificates as the owners of the shares of stock mentioned in them?

A. I couldn't state.

Q. You don't remember?

A. I couldn't state it positively.

Mr. Davis: I presume if there is any point made on that I will have to send over and get them.

Judge McConnell: I am not raising any point on that so far.

Mr. Davis: Your answer admits that the shares were tendered, but you don't know whether they were regularly endorsed or not; if any point is made that the stocks were not regularly endorsed, we will have to send over and get them.

112 Judge McConnell: Mr. Billings examined them, I don't know. Mr. Billings, step over here; what is the fact about that? We shall make no point about the stock having been

signed—about it having been on the face of it apparently signed by the person to whom the stock had been issued.

Mr. DAVIS: Then, as I understand, you make no point that the stock was not regularly endorsed and was a sufficient tender, so far as that goes?

Judge MCCONNELL: Well, I don't think we will pass on the question whether it was a sufficient tender or not; we are not raising any point about the regularity of the stock.

Q. Was anything said, Mr. Conley, at that time, except what you have stated, as a reason why they would not accept the stock?

A. That was the only reason given at the time.

Q. Were you present at the rooms of the Chicago real-estate board on September 22, 1896, at which time there was offered for sale at auction 700 shares of stock of the Diamond Match Company?

A. I was.

Q. At whose request did you attend at that time?

A. At your request.

Q. Did you have with you then any shares of stock of the Diamond Match Company?

A. I had 700 shares with me at that time.

Q. Were they some of the shares you have spoken of as having been tendered on the 31st of August?

A. Yes, sir.

Q. And for what purpose did you have those shares of stock there?

A. To be delivered—to deliver them to you.

Q. Do you know the complainants in this suit, Henry Clews & Company?

A. I do.

Q. How long have you known them, Major?

A. O, a good many years; I guess twenty-five years.

Q. Do you know all of the complainants personally?

A. Well, I couldn't answer that because I don't know how many members there are to the firm; I know three of the members.

Q. The complainants are Henry Clews, Charles M. Foster and James B. Clews.

A. Yes, sir; I know all three.

Q. And has your firm been their correspondent?

A. So far as I know, we are their Chicago correspondent.

Q. Has been for some time prior to August, 1896?

A. O, yes, a long while.

Q. Do you know who formed the partnership of Henry Clews & Company?

A. The parties you have just read—Henry Clews, Mr. Foster and James B. Clews.

113 Cross-examination by Judge MCCONNELL:

Q. Have you repeated the entire conversation that occurred at the office of Jamieson & Company?

A. So far as my recollection serves me.
Q. You told them that you had this stock and tendered it in behalf of Schwartz, Dupee & Company?
A. Yes, sir.
Q. Now, isn't it a matter of fact that Mr. Billings here was the gentleman that you saw at the desk?
A. Yes, sir.
Q. Didn't he say to you that the reason why he couldn't accept the tender of the stock was, first, because the stock exchange was closed; and, secondly, that W. H. and J. H. Moore, had been the parties for whom they had bid for the stock, and that they were not able to take it at that time because of the fact that the stock exchange was closed?
A. Well, since you remind me, he did say that the stock exchange was closed and the parties for whom the stock was purchased wouldn't receive it of them, hence he could not take it from us.
Q. When was the stock exchange closed?
A. I couldn't state the time.
Q. Well, you can approximately, can't you?
A. No, really, I could not, because——
Q. Isn't it true that the stock exchange was closed on August 3rd, or about that time, and continuously remained closed until November?
A. Well, that is about as I remember it, I couldn't remember the particular day that it closed.
Q. Well, approximately it was closed about August and did not open until about the 1st of November?
A. Approximately, yes, I should say that was the case.
Q. Major Conley, did not Mr. Billings say to you in words: "This stock was purchased for W. H. and J. H. Moore, the stock exchange being closed, we cannot receive the stock"?
A. Well, of course I couldn't—I could only give you in substance.
Q. Is that the substance of what Mr. Billings said?
A. I don't know but what he did say. My memory is not so good as it has been, but it was one or the other, that it was purchased for the Moores, or the parties for whom it was purchased; now I couldn't state positively which, but that was the substance of it, it was one of the other.

Signatures of witness waived by agreement of counsel.

JUNE 8, 1897.

114 *Testimony of Walter Comstock.*

WALTER COMSTOCK, a witness called on behalf of complainants, being first duly sworn, testified as follows:

Direct examination by Mr. DAVIS:

Q. State your full name.
A. Walter Comstock.
Q. What is your business, Mr. Comstock?

A. With Schwartz, Dupee & Company, stock clerk; handle the orders.

Q. Were you so engaged in July and August of 1896?

A. Yes, sir.

Q. At that time were Clews & Company of New York correspondents of the firm of Schwartz, Dupee & Company?

A. They were; yes, sir.

Q. In July, of 1896, will you state what orders, if any, relating to the purchase or sale of Diamond Match Company stock you received, or the firm of Schwartz, Dupee & Company received from Clews & Company?

Judge McConnell: We object; the transactions which occurred between Clews & Company and Schwartz, Dupee & Company cannot affect us, we claim, unless it appears that the transactions were disclosed at the time.

Mr. Davis: If your honor please, our position is this: These sales are made on the board of course, only between the brokers, it is true, one broker don't know who the others' clients are in all of those matters, but this is a suit by Clews & Company and they simply seek to enforce——

Judge McConnell: I don't care a bit about keeping it out, except I want my objection stated; we can argue this before the master and court with everything in; at the same time I don't want to waive a thing; I object to the whole matter.

The Master: It may be admitted subject to the objection.

Mr. Davis: I simply want to show complainants' rights, complainants' interests.

(Question read.)

A. Well, I remember of one order of 500 shares.

Judge McConnell: Hold on.

Q. Have you copies of the telegrams with you?

A. No, I have not.

Q. Can you procure them?

A. Yes, I think I can.

Mr. Davis: I have copies of all those, and if there is any objection on that score, I suppose I will have to send Mr. Comstock to bring them.

115 Judge McConnell: If you have copies we will allow the copies to go in.

The Master: You will stipulate that copies may be received in lieu of the originals, subject to all objections?

Judge McConnell: Subject to the objections that might be made to the originals. I wish to reserve all objections to the dealings that occurred between Clews & Company and Jamieson & Company.

Mr. Davis: I thought I had copies, but I haven't.

Judge McConnell: If you will produce a written history of that matter and submit it to us we will probably not object to it at all, but let you put it in.

Mr. Davis: I thought I had copies of them, but they don't go back to that time.

Judge McCONNELL: He may call from this witness, if he pleases, for all the correspondence, or a copy of all the letters which they received from Clews & Company relative to Diamond Match within a period that they want to say. The only thing that we will have to insist on, we are entitled to all anyway, we will have to have the orders, the correspondence won't show it.

Mr. DAVIS: You mean the orders from the complainants?

Judge McCONNELL: The orders from the complainants to Schwartz, Dupee & Company; we needn't come back here for that purpose, if you will have them written up and submit it to us.

Q. Mr. Comstock, can you produce the orders from Clews & Company to Schwartz, Dupee & Company, to buy or sell Diamond Match stock, in the month of July, 1896?

A. Pretty sure that I can, they should be over there, were the last time I looked at them.

Q. Will you have copies made of those?

A. Yes, sir.

Mr. DAVIS: The copies of telegrams, letters and orders produced are introduced in evidence as Complainants' Exhibit- 6 to —.

Q. Mr. Comstock, what sales of Diamond Match stock in the month of July were made by Schwartz, Dupee & Company on the Chicago stock exchange?

A. Well, July 25, we sold 500 shares.

Judge McCONNELL: I desire to have an objection reserved to that question, and to the answer which has been made.

Mr. ESTABROOK: On what ground?

Judge McCONNELL: Incompetent, and not the proper way to show it.

Mr. DAVIS: I will have Mr. Wilkins here, and with all his books to show all those transactions before we get through; all I care to show by this witness now is, that the sales which were made,
116 were made on behalf of the plaintiff-, so as to show the plaintiffs' interest, and the actual transactions on the exchange I will show by Mr. Wilkins when he returns.

The MASTER: Proceed, subject to the objection.

A. We sold 500 shares on July 25th; 200 shares on the 27th.

Q. On whose account were those sales made?

Judge McCONNELL: Object.

Q. Who were your clients in that transaction?

Judge McCONNELL: Object.

A. Henry Clews & Company.

Q. Did you, during that month, make other sales on the exchange for other clients?

A. Yes.

Q. Do you know what were the stock balances on August 3, of Diamond Match stock of Schwartz, Dupee & Company?

A. What were the stock balances?
Q. Yes.
A. The number of shares were long or short, do you mean?
Q. Yes.
A. I don't remember the exact number of shares. I will have to look at the records. I can't remember the number of shares each day.
Q. Mr. Comstock, I will hand you a card, and ask you if you are familiar with the method of settling trades in the clearing-house of the stock exchange?
A. Yes.
Q. Do you know whose signature that is to the card at the bottom, Schwartz, Dupee & Company?
A. Yes; that is Hayman, the stock-book keeper's signature.
Q. Will you explain what is the method of substitutions on the board?

Judge McConnell: We object to the incompetency and irrelevancy of the testimony.
Mr. Davis: I think I will withdraw that question then. I will have that card marked for identification, Complainants' Exhibit 6.

Q. Mr. Hayman is the stock-book keeper of Schwartz, Dupee & Company?
A. Yes, sir.
Q. Whose duty was it to sign these cards in the office of Schwartz, Dupee & Company?
A. The stock-book keeper's. I did at times, but he generally did it.

Cross-examination waived.

June 8, 1897.

117 *Testimony of H. F. Billings (Recalled).*

Mr. H. F. Billings recalled for direct examination by Mr. Davis.

Q. Mr. Billings, I hand you a card dated August 3, 1896, purporting to be signed with a stamp or typewriter, Jamieson & Co., and ask you if you recognize the signature there?
A. It is the signature—I recognize the writing as our clearing-house clerk's, I should say.
Q. That card was filled out by your clearing-house clerk?
A. I should say so.
Q. And the stamp, Jamieson & Co., is the impression of the stamp used in your office?
A. Very much, yes, sir; he probably did it.
Q. Goes for the signature of the firm, does it not?
A. Yes.

Mr. Davis: I ask to have this marked for identification, Complainants' Exhibit 7.

Adjourned to Saturday, June 19, 1897, at 2 o'clock p. m.

JUNE 30, 1897.

Met pursuant to adjournment.
Present as before.

Mr. DAVIS: We offer this stipulation in evidence, which is as follows:

EXHIBIT 7.

Statement.

On the 16th day of July, 1896, at 11.19 a. m., Schwartz, Dupee & Company received the following order from H. Clews & Company, by telegram:

"Sell 500 Diamond Match at 220½ for ac."
(Signed) "H. CLEWS & CO."

On the same day, at 11.35 a. m., Schwartz, Dupee & Company telegraphed Henry Clews & Co., as follows:

"Sold 500 Diamond Match at 221½ for the account."
(Signed) "SCHWARTZ, DUPEE & CO."

On the 20th day of July, 1896, at 9 23 a. m., Schwartz, Dupee & Company received telegram reading as follows:

"Sell 200 Diamond Match at 221 for the account at opening of market. They want put out at opening if possible, but it is good all day."
(Signed) "CLEWS."

On the same day, at 10.08 a. m., Schwartz, Dupee & Co. telegraphed Clews as follows:

"Sold 200 Diamond Match 221½ for the account."
(Signed) "SCHWARTZ, DUPEE & CO."

118 On the 25th day of July, 1896, at 11.41 a. m., Clews telegraphed Schwartz, Dupee & Co., as follows:

"Change the Diamond Match over to August account at 2½ per cent. If you cannot do it let us know at once."
(Signed) "CLEWS."

And shortly after that, on the same day, at 11.48 a. m, Clews sent the following dispatch to Schwartz, Dupee & Co.:

"You sent us the difference this morning at 2½. At what difference can you do it now?"
(Signed) "HENRY CLEWS & CO."

On the same day, at 11.58 a. m., Clews telegraphed Schwartz, Dupee & Co., as follows:

"Change the 500 at two cents or better."
(Signed) "CLEWS."

On the same day, at 12.11 p. m., Schwartz, Dupee & Co. telegraphed Clews as follows:

"Bought Diamond Match 227 for the account."
"Sold 500 229 account 2nd."
(Signed) "SCHWARTZ, DUPEE & CO."

On July 27, at 8.55 a. m., Clews telegraphed Schwartz, Dupee & Co. as follows:

"Change 200 more Diamond Match 2 per cent. or better."

(Signed) "CLEWS."

On the same day, at 10.53 a. m., Schwartz, Dupee & Co. telegraphed Clews as follows:

"We changed the 200 Match at 2¼ difference. Will give you prices later."

(Signed) "SCHWARTZ, DUPEE & CO."

On the same day, at 10.55 a. m., Schwartz, Dupee & Co. telegraphed Clews as follows:

"Bought 200 Match 226¾ account. Sold 200 2nd account, 229."

(Signed) "SCHWARTZ, DUPEE & CO."

Circuit Court of the United States, Northern District of Illinois.

HENRY CLEWS ET AL.
vs.
MALCOLM M. JAMIESON ET AL. } 24261.

Stipulation.

It is stipulated by and between the parties hereto that the foregoing are true copies of messages sent and received by and
119 between Clews & Company and Schwartz, Dupee & Company, and that they may be received in evidence with like force and effect as the original messages—the production of the originals being hereby waived.

It is further stipulated that the orders of Henry Clews & Company to Schwartz, Dupee & Company contained in said messages were, as a matter of fact, executed as set forth in the aforesaid messages from Schwartz, Dupee & Company on the Chicago stock exchange.

Dated June —, 1897.

ESTABROOK & DAVIS,
Solicitors for Complainants.
TENNEY, McCONNELL & COFFEEN,
Solicitors for Defendants.

Testimony of Walter Comstock (Recalled.)

WALTER COMSTOCK recalled for direct examination by Mr. Davis:

Q. Mr. Comstock, in the telegrams from Clews & Company, dated July 25th, to Schwartz, Dupee & Company, is the following: "Change the 500 at two cents or better;" taking that in connection with the other telegrams, can you state what Schwartz, Dupee & Company did under that order?

A. On that order?

Q. Yes; just explain the transaction.

A. Well, that "to change" means to buy for the——

Judge McCONNELL: He asked you what they did.

A. We bought 500 for the July account, which was the first account, and sold 500 for the second account.

Q. Which was what account?

A. The August account.

Q. And under the telegrams of July 27th, at 8.55 a. m., as follows: "Change 200 more Diamond Match two per cent. or better." Will you state what Schwartz, Dupee & Company did in executing that?

A. Bought 200 for the July account, and sold 200 for the August account.

Q. How much had you sold for Henry Clews & Company for the July account?

A. 700 shares.

Q. So that when you bought 500 and the 200 for the July account, that balanced the sales which you had made for the July account for Henry Clews & Company?

A. Yes.

Q. And left you with 700 shares sold for Clews & Company for the August account?

A. Yes, sir.

Q. On the 3d day of August, 1896, did Schwartz, Dupee & Company receive from the Chicago Stock Exchange clearing department a clearing-house sheet, showing——

120 Judge McConnell: I object; I suggest that you don't make it——

Q. A clearing-house sheet purporting to show——

Judge McConnell: It will show on its face what it purports to show.

Q. A clearing-house sheet, very well.

A. Yes, that is it.

Q. The brokers receive these sheets daily, do they not, from the clearing-house, or similar sheets?

A. Yes, sir.

Q. And in these sheets what is the custom as to writing out the full name of a firm or operator; they are usually abbreviated?

A. They are usually abbreviated, sometimes they are not. In this case they are all abbreviated except one.

Q. And "Schwartz" there means what, at the head of the sheet?

A. Schwartz, Dupee & Company.

Q. And the word "Jamieson," means what?

A. Jamieson & Company.

Q. This is the last clearing-house sheet received in 1896, prior to the opening of the exchange in November?

A. Yes, sir, that was the last one.

Q. And in these sheets is it customary to abbreviate the name of the stock traded in?

A. Yes, sir.

Q. And stock of the Diamond Match Company, is abbreviated, how?

A. Well, "Mtch." or "Match," one time one way and one another; Diamond Match it is called lots of times.

Q. Well, look at this sheet and see if you can tell from that what other abbreviation is.

A. Yes, I see all stocks on that sheet are abbreviated.

Q. Well, what does the "M" mean?

A. "M" means Diamond Match.

Mr. DAVIS: We offer this in evidence and ask that it be identified as Complainants' Exhibit 8, which is as follows:

COMPLAINANTS' EXHIBIT 8 TO TESTIMONY OF WALTER COMSTOCK.

CHICAGO STOCK EXCHANGE, CLEARING DEPARTMENT,
CHICAGO, *Aug.* 3, 1896.

Schwartz, D. & Co.:

We have settled all trades on your sheet this day, with the following exceptions, which have been substituted:

Bought.	Sold.	Stock.	Price.	Substitution.
	50	W. Chgo.	103¾	Wilson & S.
	150	" "	103¾	Wasmansdorff.
	1150	Match	222	Jamieson & Co.
	100	Bisc.	92	Breese & Co.
	550	"	92	Spencer.

121 Q. Mr. Comstock, on this clearing-house sheet appears on line 3, the following: "Sold 1,150 Match 222 Jamieson;" will you state what that 1,150 included?

A. What it included?

Q. Yes.

A. Well, it included the 700 Match sold for Clews & Company and 450 more for other clients.

Cross-examination waived.

Signature of witness waived.

It is stipulated that the residence and citizenship of the parties complainant- and defendants are as alleged in the bill.

JUNE 30, 1897.

Testimony of Joseph R. Wilkins.

JOSEPH R. WILKINS, a witness called on behalf of complainants, being first duly sworn, testified as follows:

Direct examination by Mr. ESTABROOK:

Q. You may state your name and occupation.
A. Joseph R. Wilkins, secretary and chairman of the Chicago stock exchange, also manager of the clearing-house.
Q. What clearing-house?
A. Clearing-house of the Chicago stock exchange.
Q. How long have you occupied those positions?
A. Occupied the position of chairman ever since the exchange started; secretaryship about eight or nine years, and manager of the clearing-house, ever since it was started, some five years ago.
Q. You were, then, occupying these positions during July and August, last year?
A. Yes, sir.
Q. What is the Chicago stock exchange?
A. Well, it is a voluntary association of gentlemen for the purpose of doing business.
Q. What kind of business?
A. Stock and bond business.
Q. When you say stock and bond business——
A. Trading in stocks and bonds and all other collaterals that are listed on the exchange.
Q. Buying and selling stocks and bonds and securities?
A. Yes, sir.
Q. Where are such stocks and bonds and securities bought and sold, that is to say, locally?
A. You mean in what part of the exchange?
Q. No, sir, in what building?
A. In the stock-exchange room.
122 Q. Owned and controlled by the association?
A. The room is not owned by them.
Q. Isn't the building owned by the——
A. The building is owned by Peck.
Q. It is at least controlled by them?
A. Yes, sir.
Q. Leased by them?
A. Yes, sir.
Q. And the building itself here in Chicago, is known as the stock-exchange building?
A. Yes, sir.
Q. Describe to the master the mode of buying and selling these various securities and commodities on the exchange.
A. Well, there is what we call an official call which takes place at ten o'clock, at that time I call off what is known as the official printed list of securities, stocks and bonds, parties who desire to make quotations make bids on them or take offers, if they have

them for sale; anybody that wants to buy bids, anybody that wants to sell, sells. During that call all the sales that are made are entered by the clerk, who sits alongside of me; that call ends when they get through—and then they go into what is known as the irregular call which lasts until half past one; at that time I make what is known as the clearing-house prices, which are the closing prices for the clearing-house that day, or in other words, the settlement prices, and at two o'clock the board adjourns.

Q. You do not, as I understand it, deal in all stocks and bonds?

A. No, sir.

Q. But, as I understand it, only such as are listed?

A. Yes, sir.

Q. On the exchange?

A. Yes, sir.

Q. Are those the ones you referred to as listed in the official call?

A. Yes, sir, they are called every day at 10 o'clock.

Q. I will ask you if Diamond Match stock is and was, in July and August, of 1896, one of the stocks listed on the exchange?

A. It was.

Q. The prices or market value of these stocks, then, as I understand it, are determined by practically an auction sale?

A. Yes, sir.

Q. In which you act as auctioneer?

A. Yes, sir; that is, we don't call it so on the exchange. For instance, if I would call Diamond Match, the judge would say, I will sell 2,500 shares at 222; his honor would say, I will give 220 for 500 shares; the judge would say, I will sell 500 at 221 and a quarter; his honor would say I will give 220 and a quarter; the judge might go down to 221 and a half, and his honor might come up to 221 and a quarter, and if they didn't come together it would be passed, no sale. If they came together I would say, Sold, 500, the judge to his honor, and it would be put on
123 record. Unless you come together, the stock is passed, somebody else comes in and makes an offer which is accepted.

Q. Now, whenever these biddings between members result in a sale, what memorandum or what notification is made of that?

A. Entered on the record books.

Q. Is it also entered on a blackboard?

A. Yes, sir; not the names.

Q. Not the names, but the fact?

A. 500 shares Diamond Match, at such a price, is put on the board.

Q. The number of shares sold of a particular stock, and the price, would be at once posted up in plain sight of the members?

A. Yes, sir.

Q. You say that only members of the exchange are permitted to deal on the floor of the exchange?

A. Permitted on the floor.

Q. Then all these transactions of buying and selling are between and among actual members of the exchange?

A. Yes, sir.
Q. And by and among no one else?
A. No.
Q. Then a stranger, even though a resident of Chicago, wouldn't be permitted to go in there and bid on stocks or to offer for sale any stocks?
A. No, sir.
Q. Except as he did it through a member of the exchange?
A. A stranger might go into what we call the strangers' place, which is outside of the railing which is on the floor. As you may know, if you have ever been there, there is a railing put around the front windows of the room, and any person who gets a card from a member, is entitled to go behind that railing.
Q. Simply as a spectator?
A. Yes, but he could call you to that railing and give you an order, and you could go back and execute it.
—. Would his name be known in the transaction on the floor of the exchange?
A. Not at all, wouldn't be recognized.
Q. So the broker through whom he deals wouldn't even notify the exchange or the party with whom he deals of his principal?
A. No.
Q. Are you acquainted with the rules, regulations, customs and methods of buying and selling on the Chicago stock exchange?
A. Yes, sir.
Q. And were in July and August of last year?
A. Yes, sir.
Q. I will ask you if the firm of Schwartz, Dupee & Company were, during those months, members of the Chicago stock exchange?
A. They were, sir.
Q. Was Jamieson & Company members of the Chicago stock exchange?
A. Yes, sir. When I say Schwartz, Dupee & Company were members, it don't mean that all the members of the firm neces-
124 sarily have to be members of the exchange. A member of a firm can be a member of the exchange and his firm is responsible for his acts on the exchange, therefore the firm virtually become members.
Q. Assuming, Mr. Wilkins, that on the 16th day of July, 1896, at 11.19 a. m., a dispatch is sent from a party in New York to a broker in Chicago, a member of the Chicago stock exchange, in these words: "Sell 500 Diamond Match at 220 and a half for account." Please explain to the master how you would interpret that order according to the rules, customs and methods of the exchange?

Judge McConnell: We object, upon the ground that the witness isn't called upon to interpret the dispatch sent from New York to another firm here in Chicago. You might ask him how to interpret an order of that kind if he received one on the exchange.

A. Only be one way to interpret it, that a person who had sent an order to a broker to sell 500 shares of Diamond Match for the

account, the broker would come on the floor, unless it was limited as to price—he would come on the floor of the exchange and try to sell 500 shares Match at 220 and a half or better, for the account, which would be July account if it was sent on the 16th.

Q. What do you mean by the account?

A. It means 500 shares of stock which is to be delivered and paid for and taken at the end of July; the delivery day for July is the last day of the month—or for any account is the last day of the month.

Q. Then the technical meaning of the word "account" is future delivery, in effect?

A. Yes, sir.

Q. I mean for the same month.

A. Yes, sir; for the month in which it is sold.

Q. So that the word "account" really means the account day of that month?

A. Yes, sir.

Q. Therefore, as I understand it, an order to sell stock for account on any particular month, means the account day of that particular month?

A. Yes, sir, except—I will have to go into an explanation. We will use the same month, for instance, you say it was the 16th when this transaction was made?

Q. Yes.

A. As I have stated, that means for delivery on the delivery day of that account, which is the last day of July, but on the 25th day of July the rules of the exchange permit the trading in what is known as the second account, which would be August in that case; that is done for the purpose of allowing men who desire to have turned, which was the case in this case from one month to another, have three or four days in which to do it, so that from the 25th day of any month up to the day before delivery day, which is the
125 day before the end of the month, I call two accounts, first account and second account. The first account is the account of that present month, which in that case would be July; the second account would have been the next account, which would have been August; then on the day before the last day of the month that stops and you go right on to the one account, which is August, of course, the following.

Q. You have in a measure anticipated my second question.

A. That I did merely to explain why there might appear to be two accounts in one month.

Q. These changes or transfers take place then, at what time in the month?

A. Any time after the 25th.

Q. Any time after the 25th, between that time and the account day?

A. And the last day.

Q. The account day of any month is the last day of that month?

A. That is the delivery day. Today is the delivery day of this account.

Q. Assuming, Mr. Wilkins, that on the 25th day of July, 1896, at 11.41 a. m., a telegraphic order is received from a party in New York by a broker in Chicago, member of the stock exchange, in these words: "Change the Diamond Match over to August account at two and a half per cent.; if you cannot do it, let us know at once." Please explain to the master what is meant there by the two and a half per cent., according to the rules and customs and nomenclature of the stock exchange?

Judge McConnell: Objected to.

A. It would mean that the 500 shares of stock which they had sold for their July account they did not wish to deliver on the last day of the month, therefore they went in and bought it in for one party and sold it out again for the August account, keeping themselves short the same amount of stock and making that difference, which they would, or at least what they wanted to make, two and a half—what they would make, I don't know.

Q. What is the two and a half per cent.?

A. Two dollars and a half a share, $250 on every 100 shares of stock for changing, for carrying the stock for another broker for another month.

Q. That would be compensation or commission?

A. Interest.

Q. It is the compensation or brokerage of the——

A. Hardly called brokerage.

Q. Or commission of the broker?

A. It is what one party who has 500 shares of stock—one broker who has 500 shares of stock that he is carrying for a customer and that customer is not prepared to take it up and he is perfectly willing to pay whatever anybody else, who is on the other side of the market will do it for, for carrying it for thirty days.

126 Q. Supposing, Mr. Wilkins, that a sale of stock is made on the exchange on the 16th day of July, on account; the person who purchases that is known at that time to the officers of the exchange, is he?

A. Yes, sir; you mean if it is made publicly on the exchange?

Q. I mean if it is made on the floor of the exchange?

A. Yes, sir.

Q. Would that person necessarily be the purchaser of that stock or responsible purchaser of that stock on the account day of that month?

Judge McConnell: I object to that especially because it involves an expression of a legal opinion; and I stand on that objection.

The Master: Let it go in subject to the objection.

A. No, sir.

Q. All sales or purchases of account are made through the clearing-house as I understand it, to which you have referred?

A. All trades made for the account must go through the clearing-house.

Q. That clearing-house is an adjunct and part of the exchange, is it?

A. Yes, sir.

Mr. ESTABROOK: I offer in evidence the clearing-house rules of the Chicago stock exchange, identified as Complainants' Exhibit 9.

Q. Those are the——

A. Yes, sir.

Judge MCCONNELL: I object to the introduction of the clearing-house rules.

The MASTER: They may be admitted subject to the objection.

Q. Were these rules, Mr. Wilkins, in force in the month of July and August, of 1896?

A. They were, sir.

Q. Calling your attention to section 3 of the clearing-house rules, I will ask you to state what blanks are referred to as being furnished by the manager?

Judge MCCONNELL: Objected to on the ground that the rule explains itself.

A. Blank referred to is that clearing-house sheet that you have in your hand.

Mr. ESTABROOK: Marked for identification as Exhibit 10. I offer this blank in evidence.

Judge MCCONNELL: I object.

The MASTER: It is admitted subject to objection.

Q. The names appearing at the left of the column in this blank, are those of members of the clearing-house?

A. Yes, sir.

127 Q. And members of the exchange?

A. Naturally, they have to be that.

Q. The names appearing at the top, or rather the initials, "WCStRR" and "NYBisCo" what do those indicate?

A. Stocks that are traded in, in the clearing-house.

Q. I will ask you if only such stocks as are indicated at the top of the page are those permitted to be traded in, in the clearing-house?

A. Yes, sir; stocks are added from time to time, and they are put on the sheet.

Q. I will ask you if only those whose names appear at the left of the page are permitted to trade in the clearing-house?

A. Any member of the exchange can trade in the clearing-house that wants to. Those sheets are gotten up with those names printed in because they happen to be those of the men who trade regularly in the clearing-house, but any member of the exchange has a perfect right to trade in the clearing-house.

Q. When these sheets are made up what becomes of them?

A. They are kept till the end of the month when the account is

settled, when they are destroyed, but a summary is kept of every day; that has been kept from the time the clearing-house was started up to the present time.

Q. Have you the original sheets made out for the 25th day of July, 1896?

A. The original clearing-house sheets?

Q. Yes, sir.

A. No, sir.

Q. For the 27th day of July, 1896?

A. No, sir; I have no sheets except the present month,—the last month. As I said, everything is destroyed at the end of every month after everything is settled up.

Q. But they still retain summaries?

A. A summary of every day's work.

Q. In what shape is that summary?

A. Well, it is made out, really, a summary of everybody's transactions on a certain day, just how many shares of one stock they are long, how many shares of another stock they are short, how much money they had up in the clearing-house on that day?

Q. Is a summary statement taken from their sheet given to the members at the close of each day, or each day?

A. A summary of their sheet?

Q. Yes, sir.

A. You may receive what we call a substitute slip, telling who they have got stock bought or sold to, which of course is virtually the same thing, but they don't get a summary of the sheet.

Q. Isn't that made up from the sheet?

A. Oh, yes, that is made up from this.

Q. Showing you Exhibit 8, I will ask you from what
128 source the information contained in it is derived?

A. This is a copy. From the summary, showing just how they stood on that day in every stock.

Q. Is there not, Mr. Wilkins, in addition to the statement as to how they stood on that day, also given the person who was substituted in their contract?

A. There is in that statement.

Q. That, however, is not made up from your clearing-house sheet?

A. Certainly, that is the last thing made up, the clearing-house sheets are balanced; first, every man's sheet is taken, there may be fifty different men in the clearing-house, those sheets are all taken in, and the stock and money is balanced every day at noon, or whatever time the clerks get through, then the summary is made up of John Jones' sheet, 500 Match short, Peter Smith long 500 Match; that summary is then made up and those slips are made from the summary.

Q. I will ask you if your authority to make these substitutions of names of purchasers is not derived under section 5 of the rules to which I have referred.

Judge McConnell: Objection; calling for an opinion and conclusion.

A. It is, sir.

Q. Please explain to the master and myself the working of that rule.

A. It simply says, I can say what it says myself, so as to have what may follow come in line with it. It says that the manager shall borrow or loan stock; it means to say that if you are a member of the stock exchange put in a clearing-house sheet on one morning, and in balancing that sheet you are 500 shares—you show that you are 500 shares of Diamond Match long, you put that sheet in, and by putting that in with the sheet in the condition it is, it is taken as authority for the manager of the clearing-house to borrow that stock for you from somebody else, that is what the clearing-house is for, to save the broker the bother of doing that business himself. The Judge might be another member of the exchange, he might put in a sheet showing that he was short 500 shares of Diamond Match, in other words, just the opposite to what you would be, or there might be five different brokers on the floor, each putting in a sheet 100 shares short. If you are long, the manager of the clearing-house through his clerks takes every sheet, the sheets must all balance or else the business stops and don't go on until it does balance, so that the stock and differences must balance every day before the summary is made up; therefore, if you are 500 shares of stock long on Diamond Match, there must be somebody in that clearing-house who is 500 shares of stock short, or the sheets wouldn't balance, therefore, the manager of the clearing-house borrows
129 from you, who may be long 500 to supply the Judge, if he is short 500, or to supply five other men who are short 100 each, and in doing that the summary is made up, and they get that notice which you have just referred to.

Q. That, in effect, Mr. Wilkins, results, does it not, in the substitution from time to time, or from day to day, as the case may be, of a different purchaser or buyer of stock?

A. It may or it may not.

Q. Again calling your attention to Exhibit 8, I will ask you to translate the third line.

A. Well, the third line means that Schwartz, Dupee & Company on that day were short 1,150 shares of Match which they had with Mr. Jamieson, which they had virtually loaned Mr. Jamieson; Schwartz & Dupee, according to that, were short 1,150 shares at 222, Mr. Jamieson by his substitution sheet would appear just the opposite.

Q. 1,150 shares of what?

A. Diamond Match.

Q. That was the only match stock listed, was it not?

A. Yes, sir.

Q. On the second day of August, 1896, a sheet such as this might have had, instead of the name of Jamieson & Company, the name of any other broker who happened to be long that number of shares?

A. And Schwartz & Dupee were short that number.

The MASTER: Will you kindly explain fully the operations of the clearing-house, which you have partially done already.

A. I suppose I can better do that by taking this same stock, Diamond Match, and taking these two parties' names, Mr. Jamieson and Mr. Schwartz. We will take yesterday, Mr. Schwartz might come on the floor and offer 500 shares of Diamond Match at 222, account; Jamieson might take it; now that would be a sale at 222. As I have stated, I go into the chair at half past one and make what is called settlement prices, those prices are made for the purpose of making a price at which all stock which goes into the clearing-house the first thing the next morning must be settled at, so that if this 500 shares of stock was bought and sold at 222 and the clearing-house price of that same day at half past one, which would be for this morning, you understand, for settlement of yesterday's trades, but to go in the first thing this morning was 221, Jamieson, who had bought it for 222, would put his sheet in 500 from Schwartz & Dupee, and put in a certified check for $500, due to the settlement price, Schwartz & Dupee would put in their draft for $500, and put in a draft to get five hundred out, because they are taking it from the clearing-house from somebody at a point cheaper than they actually sold it at, therefore they get that $500 out of the clearing-house by a draft which they put in, and they have then got their contract at 221 instead of 222. That is the way, both stock and money; the man whom it is against in the clearing-house puts in a certified check; the man in whose favor it is, draws a draft out of the clearing-house; that balances the money, and as I have stated, the stock must balance by some man being long just as much as the other man is short.

Q. When you say a sale of yesterday on account, you mean to be settled for today, being the last of the month?

A. It would be in this case. But I am speaking now as though we were in the middle of the month. At the same time when any person puts in a sheet in the clearing-house of 500 shares, they would be obliged to put in a margin, certified check for ten points, that is, 500 shares would be $5,000, that margin remains in the clearing-house until that stock is actually taken up by the party who has it there; that has nothing to do with the difference every day. That margin stays right there for that particular 500 shares of stock, or whatever it may be, and he simply puts in or takes out the man who puts in his certified check today for a difference of 50¢ may draw it out the next day by a change in the settlement price at the end of every day.

The MASTER: But until the transaction is ended, the margin remains?

A. The margin stays until the transaction is actually ended. About the substitution, the only thing further I can say—when a sheet is put in showing 500 shares of stock long by Jamieson & Company, there must be a sheet showing 500 shares of stock short by somebody—either one sheet of 500 or five sheets of 100 each, or ten sheets of 50 each.

The MASTER: That is simply because when a trade is made there are two parties to it?

A. Yes; and at the end of the day when the clerks get through making up their balances, in order to get up the substitution notices those sheets must balance both as to money and as to stocks.

Q. Presuming, Mr. Wilkins, that on a particular date a broker had sold 700 shares of stock for the account, and that on that same day ten other brokers have bought stock aggregating 50 shares each to 100 shares each, how would you make out the substitution sheet of that date?

A. That would depend entirely on circumstances. As a rule, the clearing-house endeavors to arrange things for the best advantage of the men in it. For instance, if there is one man has 700 shares of stock and one other man has the same amount of 700, in all probability the clerks would give those two men each the 700
131 shares for the sake of convenience, to each of them; there is no absolute rule which compels me as manager to give either the 700 shares to a man or seven 100.

Q. But as manager would you have authority, under this rule, to put down 50 shares to one and 650 to another?

A. Yes, sir.

Q. Or 100 to one, 200 to another and 400 to still another?

A. Yes, sir.

Q. So that you could substitute as the purchaser of that share whomsoever was short on that to any amount?

A. Yes, sir; so long as it balances.

Q. That would be brought under this rule?

A. Yes, sir; that is the way we take it under that rule, which authorizes to borrow and loan stock.

Q. Is it not then in substance the rule which you claim authorizes you to substitute for the original purchaser any one on that stock exchange who is willing to become a purchaser, who, as a matter of fact, is long?

A. Not anybody who is willing, he must have become a purchaser and be in the clearing-house.

Q. Purchaser from some source?

A. No; must have been in the clearing-house. I couldn't substitute anybody who is not in the clearing-house, of course.

Q. You spoke, Mr. Wilkins, of yourself fixing the settling price each day for the account. Do you mean by that that you arbitrarily set a price?

A. No; I get up at half past one o'clock and I call the different stocks that are in the clearing-house, and only those stocks at that time. Diamond Match is called, 220 is bid for the account; it is offered at 222; 220½ is bid, and it is offered at 221½, 221 is bid, and it is offered at a quarter, and the last bid price before I ring the bell or put the mallet down is the price fixed for the settlement price of that day.

Q. Then that is fixed by auction, the same as the other prices?

A. Yes, sir.

Q. You spoke also of margining sales and purchases; explain to the master what you mean by that.

A. Every stock that goes in the clearing-house, Diamond Match, take for instance, any man who puts a sheet in tomorrow morning with 100 shares would have to put a certified check in of $1,000; that is, unless his sheet balanced. If he had 100 shares of stock bought and 100 sold, and simply the difference to draw out or put in, he wouldn't put any margin in because he wouldn't have any stock in the clearing-house, but if there is anything open on his sheet he would put in a thousand for every hundred shares of stock.

Q. Whoever purchases or sells stock, then, for the account is required to put up 10 per cent. of the par value of the stock as margin?

A. Yes, sir.

132 Judge McCONNELL: If a broker or a member of the stock exchange sold 100 shares and bought 100 shares, bought for one customer and sold for the other he wouldn't put up any margin?

A. No, sir; of course the clearing-house wouldn't know anything about the customers; simply know that his sheet was balanced.

Q. They don't deal with customers at all?

A. No, sir.

Q. I will ask you if there is anything in the customs or rules of the exchange which limits the liability of a member to the amount that he has deposited as margins.

Judge McCONNELL: Objected to.

The MASTER: I think he may answer.

Judge McCONNELL: Calling for an opinion that only the court ought to render.

A. Do you mean by that question if the amount of margins which the broker had up in the clearing-house was not sufficient to cover the loss sustained the party on the other side would he have a claim against that broker for the balance?

Q. Yes.

A. The rules say that all debts between members shall be binding.

Q. After these substitution sheets, as you term them, are made from the clearing-house sheet and given to the various parties, I will ask you if there is any other document made out and signed by the parties to the contract, in pursuance of this substitution.

A. Yes, sir; there is.

Q. What?

A. What is known as trading cards.

Q. Calling your attention to Exhibits "6" and "7," I will ask you if these are the trading cards to which you refer.

A. Yes, sir.

Mr. ESTABROOK: I offer in evidence, may it please the court, Exhibits "6" and "7," which are as follows.

EXHIBIT 6 TO TESTIMONY OF JOSEPH R. WILKINS.

EXHIBIT 6.

CHICAGO, *Aug.* 3, 1896.

M. Jamieson & Co.:

We hereby confirm sales made by us for the account today under the rules of the Chicago stock exchange, also substitution trades.

Am't.	Kind of property.	Price.
	Substitution trades—Sold.	
11.50	Match.	222
	Difference { Collect	287 56
	Pay.	

(Signed) SCHWARTZ, D. & CO.

133 EXHIBIT 7 TO TESTIMONY OF JOSEPH R. WILKINS.

EXHIBIT 7.

CHICAGO, *Aug.* 3, 1896.

M. Schwartz:

We hereby confirm purchases made by us for the account today, under the rules of the Chicago stock exchange, also substitution trades.

Am't.	Kind of property.	Price.
	Substitution trades—Bought.	
11.50	D. Match.	222
	Difference { Collect	
	Pay	287 50

(Signed) JAMIESON & CO.

Q. Translate Exhibit 6.

A. The only way I can translate it is by simply reading it, says, they hereby confirm sales made by you for the amount of today under the rules of the Chicago stock exchange and also substitution; that card would show that they had no sales and they accepted the substitution which I had given them for 1,150 shares of Match at 222 and they collected $287.50.

Q. Who did?

A. Schwartz & Dupee.

Q. Then I will ask you to translate Exhibit 7?

A. That is exactly the same as Exhibit 6, except that they paid $287.50. At least, this is Jamieson & Co., that is, Jamieson & Com-

pany say that they have bought 1,150 shares of stock at 222 and paid $287.50; Schwartz, Dupee & Company say that they have sold 1,150 shares of Match at 222 and collected $287.50; that balances the stock and balances the money.

Q. Who were these cards delivered to?

A. To the clearing-house, they were put in the night before.

Q By whom?

A. By the parties—by the opposite party. For instance, Schwartz would put Jamieson's card in, and Jamieson put Schwartz's card in, and the sheets that come in the next morning must confirm these cards. In other words they are simply copies of one another, the cards and the sheets.

Q. Calling your attention to the answer of the governing committee filed in this case, in which it states that there is on deposit a trust fund by Jamieson and also by Schwartz, Dupee & Company of $7,000 each to secure the performance of this contract of August 3, I will ask you if, to your knowledge, you know that is true?

A. It is, sir.

134 Q. It is?

A. Yes, sir.

Q. Was the stock exchange open on August 3d?

A. Yes, sir.

Q. Was it on August 4th?

A. No, sir.

Q. How long was it closed?

A. It opened on the 5th day of November.

Q. Of 1896?

A. Yes, sir.

Q. Was it closed continuously without even an occasional opening, between August 5 and November 5?

A. It was; that is, never opened for business.

Q. Do you know why it was closed?

A. It was closed by authority of the governing committee, that is all. Of course, I knew about it. I am merely the secretary of that body.

Q. Is Mr. Jamieson a member of that committee?

A. He was at that time, he is not now.

Q. Was he at that time?

A. Yes, sir. He was president of the exchange at that time.

Q. Do you know whether or not any objection was made by Mr. Jamieson to the closing of this exchange at that time?

A. That would be telling part of the history of the meeting of the stock exchange, that I don't know that I, as secretary have any right to do unless his honor tells me to.

The MASTER: I think the question is a proper one.

A. Mr. Jamieson made no objection to the closing of the stock exchange.

Q. I will ask you if it was closed, whether the vote on it was unanimous?

Judge MCCONNELL: We object to that upon the ground that if there is a rule——

Mr. ESTABROOK: Well, I don't care how the others voted. Question withdrawn.

A. At the time of its being closed, on the morning of August 4, was there anything in the resolution closing it, providing for its reopening at any particular date?

Judge MCCONNELL: I object on the ground that it should be shown by the best evidence of it, which is the record?

Q. Have you the resolution?
A. Of, closing? No, sir; I have no minutes of the governing committee here. If you say I should tell what the resolution was, no trouble for me to do it, I don't require the minutes to do that—that is, for the sense of it.
Q. Was the resolution made a matter of record?
A. Certainly.
Q. If they insist upon the best evidence you can get it?

Judge MCCONNELL: I won't insist upon it.

135 A. Closed during the pleasure of the governing committee, or words to that effect. Meant to be closed until the governing committee said it was to be open again. I hand you a copy of the resolution.

Mr. ESTABROOK: This resolution is introduced in evidence as Complainants' Exhibit 11, which is as follows:
"Resolved, That the exchange adjourn on Tuesday morning 4th inst., and remain closed pending further action by this committee."

Q. Do you know, Mr. Wilkins, what the opening of the market was on the stock exchange, on its reopening in November, 1896?
A. I can tell by looking at the official sheet.
Q. Have you the official sheet with you?
A. Yes, sir.
Q. Please produce it.

Judge MCCONNELL: Objected to as irrelevant.
Mr. ESTABROOK: I offer in evidence the official record of the sales of Diamond Match, on November 5, 1896, on the reopening of the exchange as Exhibit 12.
Judge MCCONNELL: Objected to as immaterial.
The MASTER: Admitted subject to the objection.
It is stipulated that so much of the exhibit may be read into the record as pertains to the purchase and sale of Diamond Match stock only, subject to objection, and the remainder of the exhibit omitted.
The WITNESS: 30 shares at the first call, at 130, 1,013 after calls at 130, and 35 at 130⅛, and the clearing-house settlement price on that day was 129½. (Reading from Exhibit 12.) There is one thing, that all this stock and all these prices that I have given you, was regular stock, not account stock; there was no account stock sold that day. Whether that makes any difference to your case or not, I don't know.

Q. For delivery at the end of that particular month?
A. Yes.
Q. I am talking about cash sales?
A. That is just as I have given it to you.
Q. Have you got the official record of sales for the next day?
A. No, I have not.
Q. Calling your attention to Exhibit A attached to the answer of certain defendants, so labeled, represented by Mr. Dawes, I will ask you whether or not those are the rules and by-laws and constitution of the stock exchange, in force in July and August, 1896?
A. Yes, sir.
Q. Calling your attention to section 12 of the clearing-house rules, I will ask you if that as printed was not in force at that time?
A. At that time, yes, sir.
136 Q. So that the pencil erasure there——
A. Is simply something that has been done since.

Mr. ESTABROOK: I offer these in evidence as Exhibit 13. It is stipulated that each side may read into the record such of the constitution and by-laws and rules as it may see fit, subject to all objections as to competency and relevancy.

Mr. ESTABROOK: Do you object to these as incompetent, not having been shown to have been regularly passed, or anything of that kind?

Judge MCCONNELL: No formal question is raised on the part of the defendants as to the proof of record or the mode of passage—mode of adoption.

Cross-examination waived.

Mr. ESTABROOK: Of the constitution, by laws and rules of the Chicago stock exchange, we desire copied into the record the following:

Constitution and By-Laws of Chicago Stock Exchange to Testimony of Joseph R. Wilkins.

ARTICLE I.

Title of the Association.

The title of this association shall be "The Chicago stock exchange."

ARTICLE II.

Government of the Exchange.

The whole government of the exchange shall be vested in a governing committee composed of the president and twenty-four members, elected in the manner hereinafter provided.

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ARTICLE VI.

Duties of President and Vice-President.

It shall be the duty of the president to see that the several provisions of the constitution and by-laws are enforced, and to have a general care of the interests of the exchange. He may preside over the exchange whenever he may elect so to do, and he shall be president of the governing committee.

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137 ARTICLE XIII.

Place of Business—Partnerships and Dissolutions.

SECTION 1. Every member must have in the vicinity of the exchange, a place of business other than the exchange, where comparisons may be made at any time during the day, after the expiration of one hour from the time of the transaction, and where notices may be served; and it shall be the duty of every member to keep filed with the secretary a written notice designating such place of business, and similarly to give notice of any change thereof. Any member neglecting to comply with this rule may be considered in default on his contracts, and such contracts may be closed out according to article XVII of the by-laws.

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ARTICLE XV.

Suspended Members—Readmissions—Claims of Creditors, etc.

SECTION 1. Any member who fails to comply with his contracts, or who becomes insolvent, shall be suspended until he has settled with his creditors. Such member shall immediately inform the president in writing that he is unable to meet his engagements, and it shall be the duty of the presiding officer thereupon to give notice from the chair of the suspension of such member. The secretary shall record the failure *to* such member in a book kept for that purpose. In default of giving such information, the party, on application for readmission, shall not be entitled to a reference of his case to the committee on admissions unless two-thirds of the governing committee present shall vote in favor of such reference.

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ARTICLE XVII.

Fictitious Sales, Bids, and Offers.

SECTION 1. No fictitious sales shall be made. Any member contravening this section shall, upon conviction, be suspended by the governing committee.

SEC. 2. Any member who shall make fictitious or trifling bids or offers, or who shall offer to buy or sell any stock or security other than Government bonds, at a less variation than one-eighth of one per cent. shall, upon conviction, be subject to suspension, or such other penalty as the governing committee shall impose.

138 ARTICLE XVIII.

Payment and Deliveries in Certain Cases to be Simultaneous.

In all deliveries of stocks, bonds, etc., the party delivering shall have the right to require the purchase-money to be paid at the time and place of delivery.

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ARTICLE XXIX.

Any member of this exchange who is interested in, or associated with, or whose office is connected directly or indirectly by wire or other method or contrivance, with any organization, firm or individual engaged in the business of dealing in differences or quotations on the fluctuations in the market price of any commodity or security without a *bona fide* purchase or sale of said commodity or security in a regular market or exchange shall, on conviction thereof, be deemed to have committed an act or acts detrimental to the interest and welfare of the exchange.

BY-LAWS.

ARTICLE I.

Hours of Business.

SECTION 1. The exchange shall be open for the transaction of business upon every business day from 10 a. m. until 2 o'clock p. m.

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ARTICLE IV.

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No sale of securities shall be made on which a deposit shall be offered as the limit of liability.

Any member guilty of dealing, or offering to deal, with a person not a member, in the rooms of the exchange, shall be fined fifty dollars, without excuse or appeal, and for a repetition of the offense he shall be suspended for a term not exceeding sixty days.

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139 ARTICLE VII.

Hour for the Delivery of Securities—Payments.

SECTION 1. All deliveries of securities must be made between 11 a. m. and 1.30 o'clock p. m., or the buyer may demand that they shall lie over until the next day without interest, when they shall be delivered before 10.30 o'clock a. m., and when deliveries are not made by that time the contract may be closed under the rule after due notice to the defaulting party as provided in article XVII of the by-laws. Such notice must be given, however, not later than 10.45 o'clock a. m., and the contract must be closed without delay unless the time for so doing be extended by mutual consent. In all cases

certified checks on national or State banks must be given in payment of all securities delivered.

In the absence of any notice or agreement, the contract shall continue without interest until the following day, when the same rule shall apply. In every case of non-delivery, however, the party in default shall be liable, in addition, for the damages that may accrue.

SEC. 3. This rule shall apply to borrowed and loaned securities. When a sale has been made for cash after 1 o'clock p. m. the seller shall have until 2 p. m. to make his delivery.

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ARTICLE XVI.

Mutual Deposits on Contracts.

SECTION 1. In any contract either party may call at any time during the continuance of the same for a deposit of ten dollars per share upon the par value of the securities bought and sold; and whenever the market price of the securities shall change so as to reduce the margin of said deposit either way below the ten dollars, either party may call for a deposit sufficient to restore the margin to ten dollars, and this may be repeated as often as the margin may be so reduced. In all cases where deposits are called they shall be made within one banking hour from the time of such call.

SEC. 2. In case either party shall fail to comply with the demand for a deposit in accordance with the provisions of this article, the party calling, after having given due notice, may report the default to an officer of the exchange, who shall repurchase or resell the security forthwith in the exchange, and any difference that may accrue shall be paid over to the party entitled thereto. The notice above referred to shall be either personal or shall be left in writing at the office of the party to be notified or in case he has no office, then by public announcement whenever the exchange may be in session.

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ARTICLE XVII.

Default—Closing Contracts under the Rule.

Should any member neglect to fulfill his contract on the day it becomes due, the party or parties contracting with him shall, after giving notice as required by section 2 of the preceding article, employ an officer of the board to close the same forthwith in the exchange by purchase or sale as the case may require, unless the price of settlement has been agreed upon by the contracting parties. In case of a failure of a creditor to close the contract as above, the price shall be fixed by the price current at the time such contract ought to have been closed under the rule. In all cases where an officer may be directed to buy or sell securities under this rule, the name of the member defaulting, as well as that of the member giving the order shall be announced. No order for the purchase or sale of securities under this rule shall be executed unless made out

in writing over the signature of the party giving the order, who shall state the reason therefor; and it shall be the duty of the officer who executes the order to endorse thereon the name of the purchaser or seller, the price and the hour at which the contract is closed, and hand the same to the secretary of the board, who shall within twenty-four hours ascertain whether the party for whose account the order was given has paid the difference, if any, arising from the transaction; if not, the secretary shall report the default to the president. The duty devolved upon the officers of the exchange under this rule shall be performed without charge. No party shall be permitted to supply offers to buy or sell securities closed for his account under the rule; and when a contract is closed under this rule any action of the defaulter direct or indirect, by which the prompt fulfillment of such contract is delayed, hindered or evaded to the detriment of the other contracting party, shall subject the offending party to suspension for not less than thirty days in the discretion of the governing committee, by a vote of two-thirds of the members present at the meeting. When contracts are closed out under the rule, any member supplying the bid or offer, and not duly receiving or delivering the stock, as the case may be, renders himself liable to prosecution under this article. Should any stock thus sold not be delivered until the next day, the contract shall continue, but the defaulting party shall be
141 liable to pay such damage as may be assessed by the arbitration committee. The same rules as to notice, time and place that govern defaults in other contracts shall apply to borrowed securities, which on non-delivery or receipt, must be borrowed or loaned in open market, except in case of actual default in receiving or delivering after notice to close the loan; then the same are to be bought or sold, as the case may be, for account of the defaulter in the manner provided in this article.

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ARTICLE XXVIII.

No person other than a member shall have a right to file any claim against any member of the exchange.

Clearing-house Rules.

SECTION 1. Under the following regulations transactions may be made for "the account" in any securities listed for that purpose dealt in at the exchange.

SEC. 2. Deliveries of cash stock or transactions for "the account" shall be made on the last day of each month. Provided, however, should the last day of any month occur on a holiday or on a day when the exchange is closed for business, then in that case deliveries shall be made on the first business day preceding.

SEC. 3. All purchases and sales for "the account" shall be entered upon the blanks furnished by the manager, sealed for that purpose, and said blanks properly filled out, balanced, accompanied by a proof-sheet and signed, must be delivered to said mana-

ger before 9.45 a. m. It shall be the duty of the manager to compare and examine the statements rendered, and to report, should any errors be found, to the parties making such errors before 12 m., by written notice, which must be called for at the manager's office. Parties in error must at once proceed to adjust the same and correct their statements. All balances due from members, as shown by the statements, shall be paid by certified check drawn to the order of the bank design-ed for that purpose, and delivered to the manager before 10.15 a. m., the same day, except on Saturdays, when the balance must be paid before 9.45 a. m.

SEC. 4. On balances due to members, as shown by the statements, a draft for the amount payable to their own order, shall be drawn upon the bank designated for that purpose, and delivered to the manager before 10.20 a. m. (except on Saturday). The manager shall cause the said draft, if correct, to be accepted by said bank, and returned to the parties entitled thereto at the manager's office.

142 SEC. 5. *On* or before 9.45 a. m. parties who have not borrowed or loaned their stock balances for "the account" shall extend said balances on their statements at the closing bid price, designated as short or long, and shall request the manager in writing to borrow or loan said stock balances for their account and risk at the closing price. Notice that such loans have been made and the names of the parties thereto will be delivered at the manager's office on or before 2 p. m. Loans made by the manager are for one day only, unless renewed between members.

SEC. 6. Stock balances, as shown by the statements, rendered for cash settling days must be delivered and paid for at the closing bid price of the previous day, as per manager's notices, before 1.30 p. m. Provided, however, if satisfactory evidence is shown the clearing-house committee that the cash stock is on hand in New York, or in transit for Chicago, three days' grace will be given the seller to make the delivery with interest, failing in which the clearing-house committee shall cause to be purchased for account of delinquent said stock in whichever market in their judgment seems best; and the party so failing to deliver shall be held responsible for all loss or damage arising therefrom, but when a failure to receive or deliver occurs, nothing in these notifications shall be construed to relieve the last contracting parties to the transaction from the liabilities to each other.

SEC. 7. Whenever a member fails to pay the balance due on his statement by 10.15 a. m., (except on Saturday), the manager shall notify the presiding officer of the exchange, whose duty it shall be to forthwith cause the stock balances, as shown by the statement of the delinquent, to be bought in or sold out under the rules as the case may be, and assess the party in interest on the statement *pro rata*. In case any member owes an additional amount caused by errors, disputes or assessments, said amount shall be paid within one hour from the time of notification of the same, otherwise the party will be considered as having failed and be treated accordingly.

SEC. 8. Whenever a member is unable to meet his contracts or transactions made for "the account," he shall make a statement of his transactions, to be audited that day, and deliver it to the manager or presiding officer of the exchange.

SEC. 9. The manager, or any assistants employed by him in the manager's office are positively prohibited from receiving any securities or currency or any other evidences of value, except the checks and drafts hereinbefore mentioned in these rules.

SEC. 10. The same rule as to notice, time and place, that govern defaults in other contracts shall apply to transactions for "the account."

143 SEC. 11. Neither the exchange nor any of its members (except those making the errors), the manager, or any assistants employed by him, shall be responsible for any errors made in the statements to the manager, but the errors must be settled and adjusted at once between the members making said errors when notified by the manager to do so. The manager shall report any neglect or refusal to comply with these rules to the presiding officer of the exchange.

SEC. 12. The margin to be deposited on stock trading in clearing-house selling at $100 or over per share shall be $10 per share, and on all stocks selling under $100 per share the margin shall be $5 per share.

SEC. 13. Margins deposited on trades in the clearing-house shall be considered as a margin or as a part of the same under section 1 of article XVI of the by-laws of the stock exchange. All such margins to be deposited in the clearing-house.

SEC. 14. The clearing of trades and money is not completed until the trades and substitutions are all made and notice posted to that effect by the manager of the clearing-house.

SEC. 15. The brokers have the party they may trade with or party received from the clearing-house on the substitution of the day before, in case of any failures between the hours the sheets are put in the clearing-house, 9.45 a. m., and the time the notice is posted that the substitutions are ready for that day.

SEC. 16. In event of the announcement of failure of any member to meet his contract, all stock bought in or sold out for him as "account" stock shall be settled outside of the clearing-house, and only such stock as appear on the substitution sheet of the day of the failure shall be allowed to clear on the clearing-house sheet of the following morning.

SEC. 17. When any member fails to execute any contracts required of him by the clearing-house, the margin checks deposited by such member for the protection of other members contracting with him through the clearing-house, shall be held first for that special purpose, and after satisfying the claims of such members to the extent of the margin rule of the clearing-house, the balance, if any, shall be held for a period not exceeding ten days, as a trust fund for a *pro rata* distribution among other creditors, who are members of the Chicago stock exchange.

144 *Testimony of H. J. Davis.*

JUNE 30, 1897.

H. J. DAVIS, being first duly sworn, testified as follows:

On September 11, 1896, I delivered to Jamieson & Co. the letter of Schwartz, Dupee & Co., dated September 9, which has been introduced in evidence as Exhibit 2, also the letter of September 10, 1896, signed Henry Clews & Co., by Estabrook & Davis, which has been introduced in evidence as Exhibit 1. Said deliveries were made to Henry F. Billings at the office of Jamieson & Co. Mr. Billings received the letters and said that he would receive them; he read them and then remarked, "The transactions referred to were on the stock exchange." That was all he said. I then prepared a notice, of which the following is a copy, being the first advertisement of the sale of 700 shares of stock, and is offered as Exhibit 14:

EXHIBIT 14.

Estabrook & Davis, # 807 Chamber of Commerce building.

Sale of Diamond Match Stock.

Notice is hereby given that on Tuesday, the 15th day of September, 1896, at one o'clock p. m., at the judicial salesrooms of the Chicago real-estate board, No. 57 Dearborn St., in the city of Chicago, county of Cook and State of Illinois, the undersigned will offer for sale, and sell, at auction, to the highest bidder for cash, seven hundred (700) shares of the capital stock of the Diamond Match Company.

HENRY CLEWS & COMPANY,
By ESTABROOK & DAVIS,
Their Attorneys.

I sent that advertisement to every broker, and every banker who was a member of the stock exchange of Chicago, three or four days before the 15th of September, 1896.

Judge MCCONNELL: It is understood that this is subject to objection as to competency and relevancy.

I also caused to be inserted an advertisement, in the same language, in the Chicago Daily Bulletin, a legal paper of general circulation among bankers, brokers, and real-estate men, and lawyers in the city of Chicago. It was inserted three days. I know, as a matter of fact, that all the newspapers in the city also had notices of this advertised sale. On the 15th day of September, at the hour appointed for the sale, I attended, and there were, I should
145 think, over one hundred persons there, stock brokers, people who, from their conversation I saw were interested in that advertised sale. At that hour I adjourned the sale for one week, until the 22nd of September, at 1 o'clock p. m., and made a public

announcement of that adjournment. The adjournment was also noticed in all the Chicago newspapers, and was a matter of general notoriety through the notices which the newspapers gave. On the 21st day of September, in the morning, I mailed a notice of the adjournment to all the bankers and stock brokers in the city of Chicago, sent out, I think, about 300, I don't know the exact number, in the mail, through the regular course, a copy of which is produced as follows, marked Exhibit 15.

EXHIBIT 15.

Estabrook & Davis, # 807 Chamber of Commerce building.

Sale of Diamond Match Company Stock.

Notice is hereby given that the auction sale advertised for Tuesday, the 15th day of September, 1896, at one o'clock p. m., at the judicial salesrooms of the Chicago real-estate board, No. 57 Dearborn street, in the city of Chicago, county of Cook and State of Illinois, for the sale of seven hundred (700) shares of the capital stock of the Diamond Match Company, was adjourned until Tuesday, Sept. 22, 1896, at one o'clock p. m., at which time and at the same place, said stock will be sold to the highest bidder for cash.

HENRY CLEWS & CO.,
By ESTABROOK & DAVIS,
Their Attorneys.

On the 22d day of September, at one o'clock, at number 57 Dearborn street, in the judicial salesrooms of the Chicago real-estate board, I attended, with Mr. Conley, who had with him certificates for 700 shares of stock of the Diamond Match Company. I then announced publicly to the people present that I offered these certificates for sale to the highest bidder. There were present, in my judgment, from 75 to 100 people; the room was full, well filled. I asked for bids for the 700 shares of stock. I don't remember what the bids started at, but I think less than par. The bids were raised several times until I was bid by Mr. Gage, a stock broker, $130 per share; Mr. Barber, the president of the Diamond Match Company, was there, and made a bid for, I think, 200 shares at $135 per share. I told him I would not accept a bid for less than the whole 700 shares, unless he would furnish also a bid for the balance, so that the total amount, if bid in separate lots, would aggregate more than $130 for the whole. I received
146 no other bids for the whole of the stock. I waited several minutes, gave repeated warnings that it would be struck off and sold at the bid of $130 unless there were other bidders. After a wait of several minutes I announced that it was sold to Mr. Frank N. Gage at the price of $130 per share.

Q. Did you give an order to deliver the shares to him?

A. Gave an order on Schwartz, Dupee & Company to deliver the shares to Mr. Gage upon payment to them of the amount bid.

Cross-examination waived.

Adjourned to Wednesday, July 7, 1897, at 10 o'clock a. m.

JULY 7, 1897.

Met pursuant to adjournment.
Present, as before.

Testimony of H. J. Davis (Continued).

Testimony of H. J. Davis continued:

On September 23, 1896, at 9.45 o'clock a. m., I delivered to Mr. Lathrop, the cashier of Jamieson & Company at their office, a letter dated September 22, 1896, identified by Mr. Billings and marked Exhibit 3. On September 24, 1896, at 9.50 o'clock a. m., I delivered to M. M. Jamieson personally, at the office of Jamieson & Co., a letter marked Exhibit 4, signed by Schwartz, Dupee & Company, together with the concurrence attached to said letter signed by Henry Clews & Company by Estabrook & Davis, the letter being dated September 23, 1896. Mr. Jamieson received it and said he would consult their attorney, and give Schwartz, Dupee & Company an answer at once. On September 24 I received through Schwartz, Dupee & Company a letter which I now offer in evidence and ask the master to mark Exhibit 16, and ask to have it read into the record:

EXHIBIT 16.

Jamieson & Co., bankers & brokers, 187 & 189 Dearborn St.

Members: New York stock exchange, Chicago stock exchange, Chicago board of trade.

CHICAGO, *Sept.* 24, 1896.

Schwartz, Dupee & Co., city.

GENTLEMEN: We have your letter of Sept. 23d. We have noted your suggestion therein, but as matters stand, we do not think any affirmative action is required on our part.

Yours truly, JAMIESON & CO.

147 On September 24, 1896, at 10.05 o'clock a. m., I personally saw Mr. Wilkins, the secretary of the stock exchange, and delivered to him a letter which I ask to have marked Exhibit 17 and to have copied into the record:

EXHIBIT 17.

SEPTEMBER 23, 1896.

To the Chicago stock exchange and its governing committee, Chicago.

DEAR SIRS: There is on deposit in the exchange twenty dollars ($20) per share on seven hundred (700) shares of the Diamond Match Company stock sold by us to Jamieson & Company for the August account; of this amount ten dollars ($10) per share was deposited by us, and ten dollars ($10) per share by Jamieson & Company to protect said contracts.

A tender of the stock was made by us to Jamieson & Company at their office, on the 31st day of August, 1896, before 1.30 p. m., as required by the rules. Jamieson & Company refused to accept the stock, and we now demand a payment to us of the amount of said deposits. Our clients on the transaction were Henry Clews & Company, and this demand is made on their behalf, without prejudice to their right to recover from Jamieson & Company any damages on account of the latter's default.

Very truly yours, SCHWARTZ, DUPEE & CO.

We concur in the above request.

HENRY CLEWS & CO.,
By ESTABROOK & DAVIS.

I have received no reply to that letter. I wish to correct one statement in my testimony the other day. It appears that I said when I first sent out the notices of the auction sale, I sent them to all bankers and brokers who were members of the stock exchange; what I meant to say was, and it is the fact, that I sent copies of the notice of the auction sale to all brokers who were members of the stock exchange and to all bankers in the city of Chicago.

The complainants rest.

OCTOBER 26, 1897.

It is stipulated that this cause is to be conducted on the admission by both parties that the stock exchange was closed by the order of the governing committee on August 3, and remained continuously closed until the 5th day of November, 1896.

It is stipulated that all the rules of the stock exchange may
148 be considered as attached to the answer of the governing committee; this means the answers of those defendants whose appearance was entered by Chester M. Dawes, and may be considered as in the testimony before the master.

Testimony of Frank M. Gage.

FRANK M. GAGE, a witness called on behalf of defendants, being first duly sworn, testified as follows:

Direct examination by Judge MCCONNELL:

Q. Your full name, Mr. Gage, is Frank N. Gage, is it not?

A. Yes, sir.

Q. You attended a sale, did you not, Mr. Gage, in the rooms of the real-estate exchange on the 22d of September, 1896, where Mr. Davis had conducted a sale of seven hundred shares of Diamond Match Company, seven hundred shares of the capital stock of the Diamond Match Company?

A. In the real-estate board rooms?

Q. In the real-estate board rooms?

A. Yes, sir.

Q. And you made a bid, did you not, for seven hundred shares?

A. Yes, sir.

Q. And they were struck off to you at 130 per share?
A. Yes, sir; I think that was the price.
Q. For whom did you make that purchase?
A. Is that a matter of material import?
Q. We think so.
The MASTER: You may answer.
A. I might have made it for myself, or I may have made it——
Judge MCCONNELL: The master says you may answer.
A. I made it for Mr. Wagner.
Q. Wagner? Where does Mr. Wagner reside?
A. In New York now, I think.
Q. What are Mr. Wagner's initials?
A. I have forgotten; he has a peculiar name.
Q. Is it I. H.?
A. That is it—I. H.
Q. Do you know where his place of business is in New York?
A. I do not, sir; he used to be a neighbor of mine.
Q. Did you receive the instructions from him to buy at that sale?
A. Yes, sir.
Q. In what form?
A. Verbally.
Q. Where was it that you saw him when you received your verbal instructions?
A. In my office, I think.
Q. Was he living here?
A. Yes, sir; he was a resident at that time, I think.
149 Q. In what form did you make payment for the stock?
A. I do not think the money passed through my hands.
Q. You did not pay any money, did you?
A. Not directly, I think.
Q. Indirectly, how did you pay it, if you know?
Mr. DAVIS: That is what you presume; do you know of any settlement that he made?
A. I left them talking the terms of settlement over together.
Q. You only heard them talking about it?
A. Yes.
Q. You yourself did not pay over any money for them?
A. I did not.
Q. Do you know whether Mr. Wagner was acting for himself, or for some one else?
A. I presume for himself; I don't know.
Q. Was he here personally the day the sale occurred?
A. Yes, sir.
Q. Was he at the rooms of the real-estate board at the time?
A. I don't remember; I don't remember seeing him there.

Mr. DAVIS: He was there.

Q. Had you received instructions from him as to the amount you should bid?
A. Yes, sir.
Q. That is all I will ask you, Mr. Gage.

Cross-examination by Mr. DAVIS:

Q. You mean as to the limit?

A. My impression is it was one hundred thirty-five; I know I ran very nearly to it.

Q. I will ask you again—if it will refreshen your recollection—if it was not one hundred thirty-two?

A. I would not be positive; I know that when that bid was made for a portion of it that I thought that I did not want to lose my chances to buy.

Q. But you will not say that it was 135 or 132?

A. No, sir; I will say it was not over 136; that is the nearest I can remember at this time; I have no memorandum.

Q. But you will not say it was over one hundred thirty-two?

A. No, sir; I know I went very nearly my price; of one hundred thirty-two was what I paid, it might have been one hundred thirty-two.

Q. That is all.

Signature waived.

150 *Testimony of H. F. Billings.*

H. F. BILLINGS, a witness called on behalf of defendants, being first duly sworn, testified as follows:

Direct examination by Judge MCCONNELL:

Q. I do not suppose it is necessary to identify Mr. Billings; he has already been on the stand in this case——

Mr. DAVIS: Oh, no.

Q. —put on by the complainants. What purchases or sales of Diamond Match did the firm of Jamieson & Co. have with the firm of Schwartz, Dupee & Co. from the 3d of July to the 1st of August, 1896, for the account?

Mr. DAVIS: That is the July account, I suppose?

A. Well, on the 3d of July——

Q. Do you cover the month of July there?

A. Yes, sir; on July 3d we sold Schwartz & Dupee 100 Diamond Match at 223⅜ account; on the 14th of July we sold them 100 shares Diamond Match at 222 account; on the 20th of July we bought of them 100 shares Diamond Match at 221½ account; on July 21 we sold them 100 shares Diamond Match at 223 account; these were all transactions of course for July account; there was but July account during that time. Then on the 25th of July we changed over with them, selling them 50 for July account and buying 50 for August account Diamond; I have the prices here if you wish them.

Q. Are these all the transactions in Diamond Match, aside from such substitution as was made by the manager of the clearing-house, that you had with Schwartz, Dupee & Co.?

A. It was.

Q. In the month of July?

A. Yes, sir.

Q. These were the only direct transactions, in other words?

A. Yes, sir.

Q. These were all the purchases and sales of Diamond Match stock in the month of July, 1896?

A. Yes, sir.

Mr. DAVIS: You mean directly between Jamieson & Co. and Schwartz, Dupee & Co.?

A. Yes.

Q. Did you ever have in that month any dealing whatever with the firm of Clews & Co.?

A. No, sir.

Q. Were Clews & Co. members of the stock exchange?

A. They were not.

Q. The firm of Jamieson & Co. had been regularly members of the stock exchange and brokers dealing in stocks, bonds and
151 other securities for a number of years, had they not?

A. Yes, sir.

Q. What was the price of—the stock exchange, Mr. Billings, was closed on the 3d of August by the governing committee, and remained closed continuously until the 5th day of November, 1896, have you any recollection now as to the price of Diamond Match when the stock board—when the stock exchange was reopened on the 5th of November?

A. I should say around 140.

Q. You gave those figures the other day, you know?

Mr. DAVIS: Mr. Wilkins testified 130.

Q. We have it all figured out here; maybe I can refresh your recollection?

A. If Mr. Wilkins testified that figure, it is all right.

Q. Perhaps Mr. Gage can recall it; Mr. Gage, do you recollect what price Diamond Match opened at after the exchange was opened?

Mr. GAGE: It started in about 130 and in a few days reached 140.

Mr. DAVIS: It dropped first away down.

Mr. BILLINGS: It never went below 130.

Mr. DAVIS: Never did?

Mr. BILLINGS: That is my recollection.

Mr. DAVIS: It went down to 116, Mr. Billings.

It will be stipulated that a statement may be added to the testimony of Mr. Wilkins over his signature, without being recalled before the master, showing the price of Diamond Match for the first thirty days after the opening of the stock exchange, and the highest and lowest point reached since.

Mr. DAVIS: We will agree that he will make such a statement, which, if not otherwise objectionable, may be considered in evidence, but of course we object to the materiality but not to the form in which the testimony is adduced.

Cross-examination by Mr. DAVIS:

Mr. Billings, the statement you have given of your dealings in Diamond Match stock only includes such direct sales and purchases as were originally made on the exchange with Schwartz, Dupee?
A. That is all.

Judge MCCONNELL: Pardon me, there is one other question I would like to ask before you go on with the cross-examination.
(Judge McConnell asks a question of witness not heard by reporter and witness answers in the negative.)

152 Cross-examination resumed:

Q. It does not include dealings wherein the manager of the stock exchange makes substitution under the rules, does he?
A. No.
Q. You had other dealings in July in Diamond Match stock on the board with other parties than Schwartz, Dupee & Company, had you not?
A. Yes, sir.
Q. Dealings, I mean for the August account?
A. Yes.
Q. And on August 3, 1896, you had purchased for the August account more than seven hundred shares of Diamond Match stock, had you not; you had contracts outstanding on August 3 for more than seven hundred shares, had you not?
A. I cannot say now; I think we did.
Q. Did you see "Exhibit 7" which was introduced in evidence, and has been copied into the testimony?
A. I have the original here.

Judge MCCONNELL: It does not make any difference.

Q. I will call the witness' attention to it as copied.

(Exhibit 7 is read and shown to witness.)

Judge MCCONNELL: You remember that, do you?
A. Yes, sir.
Q. And you also saw when it was introduced as evidence, Exhibit 6, being a corresponding card signed Schwartz, Dupee & Co., did you not?

(Exhibit 6 shown to witness.)

A. I don't think I ever saw that, we probably had it.
Q. When, under the rules of the exchange, the manager of the clearing-house substitutes dealings for the account the purchaser and seller who are substituted sign cards similar to the ones to which I call your attention, which are sent, are they not?

Judge MCCONNELL: I am interposing an objection to this question; it is not cross-examination. I put Mr. Billings on the stand to ask what direct transactions there were, exclusive of substitution matters, using that expression, between Jamieson & Co. and

Schwartz, Dupee & Co.; now he is cross-examining him about the substitution. I asked nothing about that; nothing about substitution trades or anything of that kind; that is part of their case, if they want to make it.

The MASTER: This is cross-examination.

Judge MCCONNELL: I object to the materiality of it, the relevancy of it. I propose to raise the question in this case whether they had any right to substitute at all. I have asked what were the direct trades. I have not gone into the question of substitu-
153 tion; there were substitution cards here; that they have proven; I have never gone into a dispute of the fact that there were cards signed respectively, Jamieson & Co. on the one side and Schwartz, Dupee & Co. on the other, but out of that there will be raised a question; and I put Mr. Billings on particularly not to contradict their case that there were substitution cards passed, and that the manager of the clearing-house undertook to substitute one purchaser and one buyer for several others, but simply to show that there were direct trades between Schwartz, Dupee & Co., just what they were and the limit of them, and they have no right to cross-examine about substitution, for I have said nothing about it. I have said what were the direct trades between Schwartz, Dupee & Co. and themselves; they have their case about substitution, which is quite apart from the inquiry I have made.

The MASTER: It is proper to inquire if the trades made included substitution.

Mr. DAVIS: It is the rule of this court that a party is limited upon cross-examination to the same matters which were called out upon direct examination, is that the rule in this court?

Judge MCCONNELL: I think it is, unless you make the witness your own witness; if you want to put Mr. Billings on so that I may——

Mr. DAVIS: If it is not material, it is not proper whether it is cross-examination——

Judge MCCONNELL: It is unless you object to it.

The MASTER: Supposing you ask a question first whether there were trades which he has named; let the question be answered and it be considered as testimony on behalf of the complainant.

Judge MCCONNELL: To which the defendant duly objects, upon the ground of irrelevancy, immateriality and incompetency of the testimony.

(Question read.)

A. I think they are.

Adjourned until Friday, October 29, 1897, at 2 o'clock.

It is stipulated that the deposition of Mr. I. H. Wagner of New York city may be taken before any officer authorized to take depositions, upon two (2) days' notice; the deposition to be taken orally and be returned to the master to be considered as part of the testimony in this case, to be signed and certified in the usual manner. Mere formalities of return in the deposition will be waived.

OCTOBER 29, 1897.

Pursuant to agreement of counsel, this cause is adjourned until October 30, 1897.

OCTOBER 30, 1897.

154 Met pursuant to adjournment.

Present: Mr. Davis for complainants, Judge McConnell for defendants.

Stipulation.

The following facts are admitted by counsel for complainant-:

It is admitted by the complainants that at the time complainants gave the several orders to Schwartz, Dupee & Company to sell on the Chicago stock exchange the various amounts of Diamond Match Company stock, and at the time said Schwartz, Dupee & Company executed said orders, said Schwartz, Dupee & Company did not have in their hands any stock of said Diamond Match Company which was the property of the complainants, nor did said Schwartz, Dupee & Company at any time thereafter have in their hands any of the stock of said Diamond Match Company, which was the property of complainants.

It is admitted by the complainants that the 1,150 shares of the capital stock of the Diamond Match Company tendered to Jamieson & Company, by Schwartz, Dupee & Company, on August 31, 1896, were not the property of the complainants nor any part thereof.

It is further admitted that the 700 shares of said stock alleged in the bill of complaint to have been sold on the 22d day of September, 1896, were not delivered to Frank N. Gage, but immediately after said sale said shares of stock were delivered to Major J. W. Conley, one of the firm of Schwartz, Dupee & Company, by H. J. Davis, who conducted said sale on behalf of Henry Clews & Company, for safe keeping by the said J. W. Conley; that afterwards, and on the same day, said H. J. Davis delivered to said Frank N. Gage a memorandum in words as follows:

"SEPTEMBER 22, 1896.

Sold to Frank N. Gage 700 shares of Diamond Match stock numbered A 680–686, inclusive, at $130 per share.

HENRY CLEWS & CO.,
Per ESTABROOK & DAVIS."

That thereupon said Gage wrote below said memorandum the following:

"CHICAGO, *September* 22, 1896. O. K.

Please deliver above to I. H. Waggoner, Esq., and accept his check in settlement.

FRANK N. GAGE."

155 And thereupon said Gage redelivered said memorandum and said order to said H. J. Davis, who thereupon delivered the same to Mr. I. H. Waggoner, together with an order on Schwartz, Dupee & Company to deliver said certificates of shares to said Wag-

goner, upon being paid the amount of $130 per share. That said Gage was employed by said Waggoner to bid at said sale, and that said Waggoner was acting for and on behalf of the complainants in this suit in the employment of said Gage.

Complainants object to the foregoing admission being considered as evidence; for while admitting that these are the facts, at the same time they claim they are immaterial to the issues in this case, and object on the ground of immateriality.

NOVEMBER 12, 1897.

Met pursuant to agreement.

Present: Mr. Davis, solicitor for complainants, and Hon. S. P. McConnell, solicitor for defendants.

Testimony of Walter Comstock (Recalled).

WALTER COMSTOCK, a witness on behalf of the defendants, being recalled, testified as follows:

Direct examination by Judge MCCONNELL:

Q. What is your full name?
A. Walter Comstock.
Q. You have already been sworn in this case?
A. I have.
Q. You are in the employ of Schwartz, Dupee & Co.?
A. Yes, sir.
Q. And have been for the last few years?
A. Yes, sir.
Q. Do you know whether or not Major Conley had in his hands on September 22, 1896, seven hundred shares of Diamond Match Company stock, which had been handed to him by Mr. H. J. Davis?
A. Yes, sir.
Q. Was that stock delivered to I. H. Waggoner on that day, or on any later day?
A. No.
Q. Did Mr. Waggoner give his check to Major Conley, or to the firm of Schwartz, Dupee & Co. for that stock?
A. We have no entry of any such check.
Q. Well, as a matter of fact——
A. He did not.
Q. Did he pay any money for that stock?
A. He did not.
Q. Did that stock remain in the hands of Schwartz, Dupee & Co.?
A. For how long?
Q. Well, until some time after September 22.
A. Yes.
Q. Did it ever go into the hands of Waggoner?
A. No.
Q. Or of Gage?
A. No.

Q. Or of Clews & Co.?
A. No.
156 Q. The stock all of the time was the property of Schwartz, Dupee & Co., was it not?
A. Yes.
Q. But it was not at any time the stock of Clews & Co.?
A. It was not their stock.
Q. And was in your possession?
A. It was.
Q. Both before and after this 22d of September?
A. It was.

Cross-examination by Mr. DAVIS:

Q. Mr. Comstock, the arrangement relative to that stock was that it was furnished by Schwartz, Dupee & Co. to Clews & Co. to be put up at auction, that was the arrangement?
A. That was the arrangement; yes, sir.
Q. And Clews & Co. had arranged with Schwartz, Dupee & Co. to substitute other stock in case this stock passed out of the hands of Schwartz, Dupee & Co., did they not?
A. Yes, sir.
Judge MCCONNELL: May I interject a question there? By that you mean that Clews & Co. had made an arrangement that if this stock happened to be gotten by some outside man, they would buy seven hundred shares of stock and bring it in?

Mr. DAVIS: I object.

A. I don't know that was what they meant, that they would furnish him with the stock; I don't know what they would give, or anything like that.
Judge MCCONNELL: They had to buy or borrow it in order to get it?
A. They may have had the stock.
Q. Not in your hands?
A. No.

Mr. DAVIS:

Q. But the arrangement was that if the purchaser at this auction sale should take this stock which Schwartz, Dupee & Co. had furnished for the purpose of this sale, then Clews & Co. were to substitute their stock of like amount in the place of the stock sold?
A. That is correct.

Judge MCCONNELL: But, as a matter of fact, no one got the stock—the stock was brought back to Schwartz, Dupee & Co. and remained there——
Mr. DAVIS: I object to the form of that question; you have the facts; as a matter of fact——
Judge MCCONNELL: As a matter of fact, I said the stock was brought back, was it not, to Schwartz, Dupee & Co. and remained in their hands?

Mr. DAVIS: It is admitted.

157 The MASTER: He has already stated that.

Statement Chicago Stock Exchange.

It is stipulated that the following is a true statement of the settlement price of Diamond Match stock on the Chicago stock exchange beginning November 5, 1896, and ending December 10, 1896; and that the lowest price was, since November 5, in December 21, 1896, when the price was $108\frac{3}{60}$; and that the highest price, since November 5th, was on September 17, 1897, when the price was $161\frac{1}{2}$.

1896.			
Nov.	5.	Settlement price	$129\frac{1}{2}$
	6.	"	$133\frac{3}{4}$
	7.	"	138
	9.	"	144
	10.	"	$142\frac{1}{2}$
	11.	"	$137\frac{3}{4}$
	12.	"	135
	13.	"	137
	14.	"	$135\frac{1}{8}$
	16.	"	131
	17.	"	$130\frac{1}{8}$
	18.	"	$127\frac{3}{4}$
	19.	"	$127\frac{1}{2}$
	20.	"	$125\frac{1}{4}$
	21.	"	$125\frac{1}{2}$
	23.	"	$127\frac{1}{2}$
	24.	"	$131\frac{1}{2}$
	25.	"	$129\frac{1}{2}$
	27.	"	130
	28.	"	129
	30.	"	129
Dec.	1.	"	130
	2.	"	$127\frac{1}{2}$
	3.	"	$126\frac{1}{2}$
	4.	"	$123\frac{1}{2}$
	5.	"	123
	7.	"	121
	8.	"	$120\frac{1}{8}$
	9.	"	$119\frac{1}{2}$
	10.	"	120
1896.			
Dec.	21.	Low price	$108\frac{3}{60}$
1897.			
Sept.	17.	High price	$161\frac{1}{2}$

158 Mr. DAVIS:

Q. Mr. Comstock, Schwartz, Dupee & Co. settled with Jamieson & Co. for the 450 shares of stock embraced in the 1,150 shares, which had been substituted on August 3, did they not?

A. They settled with them for the 450.

Q. What was the date of that settlement?

A. I did not think about that and I didn't post myself on that date; I couldn't tell without referring to the books.

Q. You know, as a matter of fact, that the parties have by private settlement settled for that 450 shares, do you not?

A. Yes, sir.

Q. And that settlement did not include any settlement for the 700 shares which Schwartz, Dupee & Co. sold for Clews & Co.?

A. No; the 400 shares were entirely separate from the 700.

Q. And that settlement was made after the commencement of this suit, was it not—was it before or after?

A. That I cannot remember without looking at the book.

Judge McConnell: I would like to have this stipulation, for I think you will need it; you have introduced the rules of the stock exchange; from the rules of the stock exchange, it would appear that Schwartz, Dupee & Co. when they made these trades had to put up some money, and that we put up some money; now, it seems to me inasmuch as Clewes & Co. are complainants here, and yet from the reading of that rule, it would seem that Schwartz, Dupee & Co. were the people who put up the money, we might have some difficulty in struggling with the facts on that question.

Mr. Davis: The answer of Schwartz, Dupee & Co. admits that they put up the money, but charged it in an open account.

Judge McConnell: Let us stipulate here—suppose we stipulate in the case here that the $7,000 which had been originally put up by Schwartz, Dupee & Co. as a margin on this trade is an account which now—say arrangements have been made as between Schwartz, Dupee & Co. and Clews & Co. that it has been transferred to Clews & Co.

Mr. Davis: That practically is in the answers.

The Master: I think that is admitted.

Judge McConnell: But if it is not, I want it in; the ——

Mr. Davis: The answer of Schwartz, Dupee & Co. admits that.

Judge McConnell: I want it in for two reasons; because if this—if you get a decree, you ought to have it; and if I get a dismissal, for want of equity, I want it.

159 *Stipulation.*

It is admitted that Schwartz, Dupee & Co. have no claim whatever of any kind or character against the fourteen thousand dollars, seven thousand dollars of which was respectively contributed by Schwartz, Dupee & Co. and Jamieson & Co. to the clearing-house of the Chicago stock exchange.

Mr. Davis:

Q. That money, Mr. Comstock, was put up by Schwartz, Dupee & Co. and still stands in their name?

A. That is—an account is never closed with Clews & Co.

Judge McConnell: That is just why I want this.

The MASTER: But that is Clews & Co.'s money?
Judge McCONNELL: Undoubtedly, you have had a settlement.

Judge McCONNELL:

Q. Mr. Comstock, when the original transactions by which certain stock was sold on the stock exchange, had by Schwartz, Dupee & Co. on the stock exchange, and the substitution made to Jamieson & Co. on the third day of August, there were certain deposits made respectively by Schwartz, Dupee & Co. and Jamieson & Co., seven thousand dollars by each of these firms, in the aggregate fourteen thousand dollars, did Schwartz, Dupee & Co. have any claim of any kind or character or any interest in that fund?

A. They have a claim on the clearing-house, stock exchange clearing-house, for seven thousand dollars for the account of Clews & Co.

Q. Then, as a matter of fact, the real interest in that fund is that of Clews & Co.?

A. Yes, sir.

Mr. DAVIS:

Q. Schwartz, Dupee & Co. would have to account to Clews & Co. if they received it?

A. Yes, sir.

Judge McCONNELL:

Q. And Schwartz, Dupee & Co., except as they should do for Clews & Co., have no claim or interest in the seven thousand dollars which was deposited by Jamieson & Co.?

A. They have no interest in that except for the account of Clews & Co.

The MASTER: In other words, they are simply the agents for the complainants; whatever they hold, they hold for the complainants.

Mr. DAVIS: Any part of that fourteen thousand dollars they received, they received in trust for Henry Clews & Co.

WITNESS: We have no interest in any part of that except as agents for Clews & Co.

Adjourned, subject to agreement of counsel.

I hereby certify that the foregoing is all the evidence taken on behalf of the complainants and defendants, and that the signatures of all witnesses were waived by stipulation of counsel.

E. B. SHERMAN,
Master in Chancery of said Court.

160 *Master's Fees for Taking Proofs.*

Complainants', paid by them.....	$87.15
Defendants', paid by them.....	23.10

(Endorsed:) Filed Jan. 22, 1898. S. W. Burnham, clerk.

Clerk's Certificate.

NORTHERN DISTRICT OF ILLINOIS, } ss:
Northern Division, }

I, S. W. Burnham, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing is a true, full and complete transcript of all the papers, exhibits, depositions, proofs, assignment of errors, and of the record of all proceedings had in the said court in a cause heretofore pending therein wherein Henry Clews, Charles M. Foster and James B. Clews are complainants, and Malcolm M. Jamieson, Roland C. Nickerson, Harry F. Billings, Edwin G. Foreman, Charles Henrotin, A. W. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, H. Herbst, Henry C. Hackney, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William N. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, George A. McClellan, A. L. Dewar, Gustavus A. Schwartz, John Dupee, John W. Conley, and Isaac J. Bloom are defendants, as the same appear from the records and files of said court now remaining in my custody and control, including at pages 37 and 38, the opinion of the Honorable P. S. Grosscup, judge of said court, filed therein upon the overruling of the demurrer to complainants' bill; and including, at pages 112, 113, 114, 115 and 116, the opinion of Honorable P. S. Grosscup, judge of said court, filed in said cause upon the final hearing thereof.

I further certify that there is attached hereto and transmitted herewith the original citation signed by the Honorable P. S. Grosscup, judge of said court, together with the acknowledgment of services endorsed thereon, which citation and acknowledgment of service were filed in my office on the 26th day of July, 1898.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this second day of August, 1898.

[SEAL.] S. W. BURNHAM, *Clerk.*

161 *Præcipe.*

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

CLEWS ET AL. }
vs. } 24261.
JAMIESON ET AL. }

The clerk of said court will please make a transcript of all the papers, exhibits, depositions, proofs, assignment of errors and other proceedings had in the above-entitled cause, for use in the United States circuit court for the seventh circuit, on appeal.

LOWDEN, ESTABROOK & DAVIS,
Sol'rs for Compl'ts.

Placita.
Bill of complaint.
Subpœna and return of marshal.
Answer of certain defendants.
Demurrer of certain defendants.
Answer of certain defendants.
Replication.
Order, demurrer heard and advisement.
Order, demurrer overruled.
Opinion by Judge Grosscup.
Answer of certain defendants.
Replication.
Order of reference.
Master's report.
Objections to master's report.
Exceptions to master's report.
Stipulation to file amended bill.
Order, leave to file amended bill, &c.
Amended bill.
Answer to amended bill.
Stipulation of facts.
Order, setting case for hearing.
Order substituting solicitors.
Order, heard and taken under advisement.
Opinion by Judge Grosscup.
Order dismissing bill.
Petition for appeal.
Assignment of errors.
Order allowing appeal.
Appeal bond.
162 Testimony.
H. F. Billings, for compl't
John W. Conley, " "
Walter Comstock, " "
Jos. R. Wilkins, " "
H. J. Davis, " "
Frank N. Gage, for def'ts.
Walter Comstock, " "

Citation.

UNITED STATES OF AMERICA, *ss:*

To Malcolm M. Jamieson, Roland C. Nickerson, Harry F. Billings, Edwin G. Foreman, Charles Henrotin, A. W. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, H. Herbst, Henry C. Hackney, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William V. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, George A. McClellan, A. L. Dewar, Gustavus A. Schwartz, John Dupee, John W. Conley, and Isaac J. Bloom:

You are hereby cited and admonished to be and appear at the United States circuit court of appeals, for the seventh circuit, to be holden at Chicago, Illinois, on or before the 22d day of August, 1898, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, northern division, wherein Henry Clews, Charles M. Foster and James B. Clews are appellants, and you are appellees, to show cause, if any there be, why the order and decree mentioned in said appeal should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 23d day of July, in the year of our Lord one thousand eight hundred and ninety-eight.

P. S. GROSSCUP,
Circuit Judge.

163 We hereby acknowledge service of the within citation this 23d day of July, 1898.

TENNEY, McCONNELL, COFFEEN & HARDING,
Solicitors for Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings, Gustavus A. Schwartz, John Dupee, Jno. W. Conley, Isaac J. Bloom.

C. M. DAWES,
Solicitor for Edwin G. Foreman, Charles Henrotin, A. W. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, H. Herbst, Henry C. Hackney, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William V. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, George A. McClellan, and A. L. Dewar.

Filed July 26, 1898.

S. W. BURNHAM, *Clerk.*

164 At a regular term of the United States circuit court of appeals for the seventh circuit, begun and held at the United States court-rooms, in the city of Chicago, in said seventh circuit, on

Monday, the third day of October, 1897, in the October term, in the year of our Lord one thousand eight hundred and ninety-seven, and of our Independence the one hundred and twenty-second year.

And afterwards, to wit, on the sixth day of August, 1898, in the October term last aforesaid, came the appellants, by their counsel, Mr. Frank C. Lowden, Mr. Henry D. Estabrook, and Mr. Herbert J. Davis, and filed in the office of the clerk of this court their appearance, said appearance being in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

HENRY CLEWS, CHARLES M. FOSTER, and JAMES B. Clews, Complainants and Appellants,
vs.
MALCOM- M. JAMIESON ET AL., Defendants and Appellees.
} Appearance.

165 We hereby enter our appearance as counsel for appellant in the above-entitled cause.

FRANK C. LOWDEN.
HENRY D. ESTABROOK.
HERBERT J. DAVIS.

Dated Chicago, August 6th, 1896.

Endorsed: Filed Aug. 6, 1897. Oliver T. Morton, clerk.

And afterwards, to wit, on the sixteenth day of August, 1897, in the October term last aforesaid, came the appellees, by their counsel, Mr. Samuel P. McConnell and Mr. Horace Kent Tenney, and filed in the office of the clerk of this court their appearance, said appearance being in the words and figures following, to wit:

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1897.

HENRY CLEWS ET AL., Appellants,
vs.
MALCOMB M. JAMIESON ET AL.
} No. 533.

The clerk will enter *my* appearance as counsel for the appellees.

SAMUEL P. McCONNELL.
HORACE KENT TENNEY.

Endorsed: Filed Aug. 16, 1897. Oliver T. Morton, clerk.

166 At a regular term of the United States circuit court of appeals for the seventh circuit, begun and held at the United States court-room, in the city of Chicago, in said seventh circuit,

on the third day of October, 1898, of the October term, in the year of our Lord one thousand eight hundred and ninety-eight, and of our Independence the one hundred and twenty-third year.

And afterwards, to wit, on the ninth day of November, 1898, in the October term last aforesaid, there was filed in the office of the clerk of this court a certain stipulation in the above-entitled cause, said stipulation being in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

HENRY CLEWS ET AL.
v.
MALCOMB M. JAMIESON ET AL.

It is stipulated by and between the parties to the above-entitled cause that the time for filing appellants' brief herein may be extended to the first day of December, 1898.

LOWDEN, ESTABROOK & DAVIS,
Solicitors for Appellants.

SAMUEL P. McCONNELL,
HORACE KENT TENNEY,
Solicitors for Appellees Jamieson & Co.

Endorsed: Filed Nov. 9, 1898. Edward M. Holloway, clerk.

167 And afterwards, on the same day, to wit, on the ninth day of November, 1898, the following proceedings were had in the above-entitled cause and entered of record, to wit:

WEDNESDAY, *November* 9, 1898.

Court met pursuant to adjournment.
Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit —.

Before Hon. William A. Woods, presiding judge.

HENRY CLEWS, CHARLES M Foster, *et al.*
vs.
MALCOMB M. JAMIESON ET AL.

533. Appeal from the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

On filing of stipulation of counsel it is ordered by the court that the time allowed by the rules of this court in which appellants may file brief in this cause be, and the same is hereby, extended to and including December 1, 1898.

And afterwards, to wit, on the seventh day of February, 1899, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

168 TUESDAY, *February* 7, 1899.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge, presiding; Hon. James G. Jenkins, circuit judge; Hon. Peter S. Grosscup, circuit judge.

HENRY CLEWS, CHARLES M. FOSTER, and JAMES B. CLEWS
vs.
MALCOMB M. JAMIESON, ROLAND C. Nickerson, and Henry F. Billings.

533. Appeal from the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

It is ordered by the court that this cause be, and the same is hereby, set down for hearing March 16, 1899.

And afterwards, to wit, on the fourteenth day of February, 1899, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

169 TUESDAY, *February* 14, 1899.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge, presiding; Hon. James G. Jenkins, circuit judge; Hon. Peter S. Grosscup, circuit judge; Hon. William H. Seaman, district judge.

Order.

It is ordered by the court that William H. Seaman, judge of the district court of the United States for the eastern district of Wisconsin, be, and he is hereby, designated and assigned to sit in this court as a member thereof during the present session. Thereupon said Seaman appeared and took his seat as a member of said court.

And afterwards, to wit, on the sixteenth day of March, 1899, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

THURSDAY, *March* 16, 1899.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge, presiding; Hon. James G. Jenkins, circuit judge; Hon. William H. Seaman, district judge.

170 HENRY CLEWS, CHARLES M. Foster, and JAMES B. CLEWS
vs.
MALCOMB M. JAMIESON, ROLAND C. Nickerson, and Henry F. Billings.

533. Appeal from the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

Now this day come the parties, by their counsel, and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. H. D. Estabrook, counsel for ap-

pellants, and by Mr. S. P. McConnell, counsel for appellees, and the court, having heard the same, takes this matter under advisement.

At a regular term of the United States circuit court of appeals for the seventh circuit, begun and held at the United States court-rooms, in the city of Chicago, in said seventh circuit, on the third day of October, 1899, in the October term, in the year of our Lord one thousand eight hundred and ninety-nine, and of our Independence the one hundred and twenty-fourth year.

And afterwards, to wit, on the third day of October, 1899, in the October term last aforesaid, there was filed in the office of the clerk of this court the opinion of the court in the above-entitled cause, said opinion being in the words and figures following, to wit:

171 In the United States Circuit Court of Appeals for the Seventh Circuit, January Session, A. D. 1899.

HENRY CLEWS, CHARLES M. FOSTER, and James B. Clews, Appellants, *vs.* MALCOMB M. JAMIESON, ROLAND C. Nickerson, Henry F. Billings, *et al.*, Appellees.	No. 533. Appeal from the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

Before Woods and Jenkins, circuit judges, and Seaman, district judge.

The appellants, comprising the firm of Henry Clews & Company, of the city and State of New York, filed their bill in equity, naming as defendants (1) the members of the firm of Jamieson & Company, (2) the managing members of the Chicago stock exchange, and (3) the members of the firm of Schwartz, Dupee & Company, all citizens of the State of Illinois. The theory of the bill and the relief prayed for are thus stated in the brief of counsel for appellants: "To have administered and turned over to them $14,000, in the possession of the managers of the Chicago stock exchange, claimed by appellants to have been deposited in trust as security for the performance of a contract whereby the appellants agreed to sell and deliver, and the appellees, Jamieson & Company agreed to receive and pay for, on the 31st day of August, 1896, seven hundred shares of Diamond Match Company stock; which contract it is alleged Jamieson & Company failed and refused to perform;" also to obtain "an accounting for the loss and damages sustained by
172 the appellants by reason of the breach of contract, and that Jamieson & Company be decreed to pay to the appellants the amount ascertained."

Separate answers were filed by the defendants Jamieson & Company and Schwartz, Dupee & Company. The remaining defendants demurred to the bill as not stating a cause of action cognizable in equity, but the demurrer was overruled and such defendants filed

separate answer. On the issues thereupon the case was sent to a master, who heard the testimony and reported his findings, which were in favor of the complainants upon all issues, and that on the accounting there was due to them from Jamieson & Company $64,400.

The hearing before the court was upon exceptions to the master's report and upon certain stipulations of further facts, and resulted in a dismissal of the bill for want of equity. From the opinion filed this conclusion appears to have been based on the view that the complainants were not privies to the transaction between Schwartz, Dupee & Company and Jamieson & Company. This appeal is from the decree of dismissal so entered.

The facts are substantially undisputed. The appellants, Henry Clews & Company, were operators in stocks and bonds at New York city; and Schwartz, Dupee & Company were like operators or brokers at Chicago, on the Chicago stock exchange, as members. Jamieson & Company were also like operators and members of the Chicago stock exchange. The relation of the complainants to any transaction in question appears in communications by wire between them and Schwartz, Dupee & Company, which are stipulated in the case as follows:

"On the 16th day of July, 1896, at 11.19 a. m., Schwartz, Dupee & Company received the following order from H. Clews & Company, by telegram:

'Sell 500 Diamond Match at 220½ for ac.'
(Signed) 'H. CLEWS & CO.'

"On the same day, at 11.35 a. m., Schwartz, Dupee & Company telegraphed Henry Clews & Co. as follows:

'Sold 500 Diamond Match at 221⅛ for the account.'
(Signed) 'SCHWARTZ, DUPEE & CO.'

"On the 20th day of July, 1896, at 9.23 a. m., Schwartz, Dupee & Company received a telegram reading as follows:

'Sell 200 Diamond Match at 221 for the account at opening of market. They want put out at opening if possible, but it is good all day.'
(Signed) 'CLEWS.'

"On the same day, at 10.08 a. m., Schwartz, Dupee & Co. telegraphed Clews as follows:

'Sold 200 Diamond Match 221½ for the account.'
(Signed) 'SCHWARTZ, DUPEE & CO.'

173 "On the 25th day of July, 1896, at 11.41 a. m., Clews telegraphed Schwartz, Dupee & Co. as follows:

'Change the Diamond Match over to August account at 2½ per cent. If you can do it let us know at once.'
(Signed) 'CLEWS.'

"And shortly after that, on the same day, at 11.48 a. m., Clews sent the following dispatch to Schwartz, Dupee & Company:

'You sent us the difference this morning at 2½. At what difference can you do it now?'
(Signed) 'HENRY CLEWS & CO.'

"On the same day at 11.58 a. m., Clews telegraphed Schwartz, Dupee & Co. as follows:

'Change the 500 at two cents or better.'
(Signed) 'CLEWS.'

"On the same day, at 12.11 p. m., Schwartz, Dupee & Co. telegraphed Clews as follows:

'Bought Diamond Match 227 for the account.'
Sold 500 229 account 2nd.
(Signed) 'SCHWARTZ, DUPEE & CO.'

"On July 27, at 8.55 a.m., Clews telegraphed Schwartz, Dupee & Co. as follows:

'Change 200 more Diamond Match 2 per cent. or better.'
(Signed) 'CLEWS.'

"On the same day, at 10.53 a. m., Schwartz, Dupee & Co. telegraphed Clews as follows:

'We changed the 200 Match at 2¼ difference. Will give you prices later.'
(Signed) 'SCHWARTZ, DUPEE & CO.'

"On the same day, at 10.55 a. m., Schwartz, Dupee & Co. telegraphed Clews as follows:

'Bought 200 Match 226¾ account. Sold 200 2nd account.'
(Signed) 'SCHWARTZ, DUPEE & CO.'"

And the stipulation further states: "That the orders of Henry Clews & Company to Schwartz, Dupee & Company contained in said messages were, as a matter of fact, executed as set forth in the aforesaid messages from Schwartz, Dupee & Company on the Chicago stock exchange."

The word "account" as used in these telegrams was understood, in the language of the stock exchange, to mean that the last day of the current month was the "day of delivery" on the proposed sale. The message of July 25, so interpreted, was understood to mean that five hundred shares of the stock previously sold for "account" should be carried over to August account, or "account second" for which accommodation the seller allowed two cents on the
174 dollar, making $2.29 per share. The final direction on July 27, was to place two hundred more shares on the same terms for August account, making their offers on that account seven hundred shares, with all previous offers cancelled.

By the rules of the stock exchange each broker, as a member, was required to keep on deposit with the managers of the exchange, as a trust fund to secure performance, an amount equal to ten per cent. par value of the stocks bought or sold, and this deposit is re-adjusted at the close of each day's session. Under this rule Schwartz, Dupee and Company claim to have kept their doposits good, and this deposit, together with that made by the buyer, constitute the alleged trust funds referred to in the bill for which administration is sought.

The method of conducting business in the stock exchange between the brokers in thus fairly stated in the master's report and in the opinion filed by the trial court:

"At ten o'clock there is an official call at which the secretary and manager call all the stocks, bonds, and securities on the official printed list, and as this call progresses, any member wishing to buy or sell, bids thereon, and the record is made of the transaction; after which there is an irregular call, which closes at half past one, when the manager of the clearing-house announces the clearing-house or settlement price- for the day, which are the closing prices on the exchange for the respective stocks and securities; that the manager then substitutes trades and sends out cards to all buying or selling on account for the current month, or for the next month; that on the 25th of the month and thereafter until the second day before the end of the month, two calls are made, one for the current month, and one for the next ensuing month, and this is done to allow those who wish to do so to change their accounts over to the next month. That this substitution was made by the clearing department by a system somewhere similar to that employed by the clearing-house for banks, that is, that where a broker has purchased and sold during the day the same amount of the same kind of stocks or bonds, his account is balanced by the clearing department, and all margins deposited by such broker may be withdrawn; that when sales and purchases are made by different brokers, one buying and the other selling, the same kind of stock or bonds, a substitution is made by the manager of the clearing department, by which it appears that the broker selling has sold such stock, not to the person to whom it was originally sold, but to a person or persons other than those to whom such sales were originally made and who originally bought of some one else, and that a broker purchasing stock has purchased from some broker other than the broker from whom he originally purchased the same; for instance, if A sold 100 shares
175 of stock to X, and B has bought the same amount of the same stock from Y, and X's and Y's accounts are balanced by other transactions, the substitution would make it appear that A had sold 100 shares to B, and B had bought 100 shares from A, and the names of the parties with whom the original transactions had actually been made by A and B would not appear on the clearing-house sheet; that in the transaction on said exchange it is then customary for the parties thus substituted and brought into the relation of buyer and seller with each other by the manager, to assent to the new relations thus formed, and to confirm the transactions as thus

adjusted by the manager, and to put up the margins required by the rules, unless the margins are already on deposit in the exchange, in which case they are transferred by the manager to the new account."

The stipulation of facts further shows all dealings of both Schwartz, Dupee & Company and Jamieson & Company which appeared upon the clearing-house sheets of the exchange for all dates in question; and although the former had original and substituted trades in Diamond Match stock with sundry other brokers prior to August 3, 1896, no trade appears with Jamieson & Company up to that date, except to the extent of 100 shares. On August 3, Jamieson & Company appeared as taking by "substitution" from Schwartz, Dupee & Co. 1,150 shares of such stock at $2.22. Of this transaction it is asserted on behalf of complainants, that 700 shares were "substitution trades" for the complainants' orders of July 25 and July 27, although at lower price than named in the order, and that Jamieson & Company thereby became the "ultimate purchaser-" of such shares in accordance with the rules of the exchange; and that "it is seldom the original purchaser who is ultimately made responsible, but by a process of daily novations the original purchaser, and many subsequent purchasers, liquidate their contracts and are discharged from liability thereon before the 'account day,' some other member of the exchange assuming the new obligation."

The stipulation in reference to the trades by Schwartz, Dupee & Co. further states as follows:

"That the 500 shares sold July 25, 1896, by Schwartz, Dupee & Company, for the 'August account,' was sold for the account of Clews & Company, the complainants; that 200 shares of the 350 shares, sold July 27, 1896, by Schwartz, Dupee & Company, for the 'August account,' were also sold on account of complainants; that all of the other sales made by Schwartz, Dupee & Company for the 'August account' were made on behalf of other clients than the complainants; that the 750 shares sold by Schwartz, Dupee & Company, on July 28th, 1896, were sold for four different clients of Schwartz, Dupee & Company; for one to the amount of 50 shares, for another to the amount of
176 300 shares, for another to the amount of 350 shares, and for another to the amount of 50 shares. The client for whom Schwartz, Dupee & Company bought the 350 shares on July 27th is the same person for whom they sold 350 shares on July 28th, and who sold in order to close his purchase of July 27th. That the client for whom Schwartz, Dupee & Company sold 300 shares on July 28th, is the same person for whom Schwartz, Dupee & Company bought 300 shares on July 29th, and said purchase of July 29th was made to cover said person's sale of July 28th. That the transactions heretofore set out in this stipulation of purchase and sale of Schwartz, Dupee & Company and the other brokers whose names are stated, with the exception of those transactions which are marked as substitutions, were had by the brokers on behalf of different clients or principals whom they represented, and those transactions, so far as the different principals are concerned, were not

settled or canceled by any of the substitutions, nor by any of the settlements between the brokers, except so far as where one client or principal of a broker was, through such broker, both a purchaser and a seller. In other words, the settlements by substitution or otherwise through the clearing-house were merely settlements between the members of the stock exchange, and were not settlements or cancellations of the contracts between the principals whom the bankers represented and the brokers themselves, except where the same broker had both purchased and sold for the same client."

On August 3, 1896, the Chicago stock exchange was closed by order of the managers and remained closed until November 5, 1896, so that there was no opportunity for further transactions on the exchange in reference to the subject-matter of this controversy, after August 3rd.

On August 31, 1896, Schwartz, Dupee & Co. made personal tender to Jamieson & Company of 1,150 shares of Diamond Match stock and the latter refused to accept or pay for the same.

The following stipulation further appears:

"It is admitted by the complainants that at the time complainants gave the several orders to Schwartz, Dupee & Company to sell on the Chicago stock exchange the various amounts of Diamond Match Company stock, and at the time said Schwartz, Dupee & Company executed said orders, said Schwartz, Dupee & Company did not have in their hands any stock of said Diamond Match Company which was the property of the complainants, nor did said Schwartz, Dupee & Company at any time thereafter have in their hands any of the stock of said Diamond Match Company which was the property of the complainants. It is admitted by the complainants that the
1,150 shares of the capital stock of the Diamond Match Com-
177 pany tendered to Jamieson & Company by Schwartz, Dupee
& Company on August 31, 1896, were not the property of the complainants, nor any part thereof."

No communication with or appearance on the part of Henry Clews & Company is shown in reference to the transactions after July 27th and up to September 10th and 11th, and any claim of their participation therein was unknown to Jamieson & Co. prior to the latter date.

On September 11, Schwartz, Dupee & Company delivered to Jamieson & Company a letter of the former, dated Sept. 9, 1896, referring to their tender of the 700 shares, and stating that the sale was made by them as agents for Henry Clews & Company, "who may rightfully take any steps to enforce the contracts" or make settlement; and also a letter of Henry Clews & Company by their attorneys, dated Sept. 10, 1896, claiming such interest in the transaction and notifying that sale of the 700 shares would be made to the highest bidder at the rooms of the Chicago Real Estate Board on September 15, 1896, etc. On September 22 and 23, notices were given respectively that the sale had been adjourned to and was made on September 22.

On September 22, 1896, Schwartz, Dupee & Company made pretended sale of 700 shares of the stock (being the same transaction

set up in the bill by way of fixing the price for measuring damages, of which the following stipulation of facts is made:

"It is further admitted that the 700 shares of said stock alleged in the bill of complaint to have been sold on the 22nd day of September, 1896, were not delivered to Frank N. Gage, but immediately after said *said* shares of stock were delivered to Major J. W. Conley, one of the firm of Schwartz, Dupee & Company, by H. J. Davis, who conducted said sale on behalf of Henry Clews & Company, for safe keeping by said J. W. Conley; that afterwards and on the same day, said H. J. Davis delivered to said Frank N. Gage a memorandum in words as follows:

'SEPTEMBER 22, 1896.

'Sold to Frank N. Gage 700 shares of Diamond Match stock numbered A 680–688, inclusive, at $130 per share.

'HENRY CLEWS & CO.,
'Per ESTABROOK & DAVIS.'

"That thereupon said Gage wrote below said memorandum the following:

'CHICAGO, *September* 22, 1896. O K.'

'Please deliver to I. H. Waggoner, Esq., and accept his check in settlement.

'FRANK M. GAGE.'

"And thereupon said Gage redelivered said memorandum and said order to said H. J. Davis, who thereupon delivered the
178 same to Mr. I. H. Waggoner, together with an order on Schwarz, Dupee & Company to deliver said certificate of shares to said Waggoner, upon being paid the amount of $130 per share. That said Gage was employed by said Waggoner to bid at said sale, and that said Waggoner was acting for and on behalf of the complainants in this suit in the employment of said Gage.

"Complainants object to the foregoing admission being considered as evidence, for while admitting that these are the facts, at the same time they claim they are immaterial to the issues in this case, and object on the ground of immateriality."

The pretended sale was so made, for the reason that the exchange was then closed, pursuant to the rules, by order of the managers, notwithstanding a rule of the exchange which reads as follows:

"Should any member neglect to fulfill his contract on the day it becomes due, the party or parties contracting with him shall, after giving notice as required by section 2 of the preceding article, employ an officer of the board to close the same forthwith in the exchange by purchase or sale as the case may require, unless the price of settlement has been agreed upon by the contracting parties. In case of a failure of a creditor to close the contract as above, the price shall be fixed by the price current at the time such contract ought to have been closed under the rule. In all cases where an officer may be directed to buy or sell securities under this rule, the name of the member defaulting as well as that of the member giving the order, shall be announced. No order for the purchase or sale of securities

under this rule shall be executed unless made out in writing over the signature of the party giving the order, who shall state the reason therefor, and it shall be the duty of the officer who executes the order to endorse thereon the name of the purchaser or seller, the price and the hour at which the contract is closed, and hand the same to the secretary of the board, who shall within twenty-four hours ascertain whether the party for whose account the order was given has paid the difference, if any, arising from the transaction; if not, the secretary shall report the default to the president. The duty devolved upon the officers of the exchange under this rule shall be performed without charge. No party shall be permitted to supply offers to buy or sell securities closed for his account under the rule; and when a contract is closed under this rule, any action of the defaulter, direct or indirect, by which the prompt fulfillment of such contract is delayed, hindered, or evaded, to the detriment of the other contracting party, shall subject the offending party to suspension for not less than thirty days in the discretion of the governing committee, by a vote of two-thirds of the members present at the meeting. When contracts are closed out under the rule, any
179 member supplying the bid or offer, and not duly receiving or delivering the stock, as the case may be, renders himself liable to prosecution under this article. Should any stock thus sold not be delivered until the next day, the contract shall continue, but the defaulting party shall not be liable to pay such damage as may be assessed by the arbitration committee. The same rules as to notice, time and places that govern defaults in other contracts shall apply to borrowed securities, which on non-delivery or receipt, must be borrowed or loaned in open market except in case of actual default in receiving or delivering after notice to close the loan; then the same are to be bought or sold, as the case may be, for the account of the defaulter in the manner provided in this article."

SEAMAN, district judge, after the foregoing statement, delivered the opinion of the court.

Except for the fund or deposit alleged to constitute security for performance of the contract in question, a remedy for a breach rests at law, and equitable jurisdiction depends upon the existence of such fund to be administered or charged. And to maintain the bill it is further indispensible for the complainants to establish: first, an executory contract of purchase by Jamieson & Co., *bona fide* and enforceable in equity, secured by such fund; second, privity of the complainants in the contract and fund; and third, actual injury either suffered or impending through the alleged breach. Failing proof or admission of these requisites, or either of them, the bill is properly dismissed for want of equity.

From the opinion filed in the trial court it appears that dismissal was based on a finding of want of privity in the alleged contract; and the arguments at the bar and in the briefs of counsel upon both sides are mainly directed to that question in its various phases as presented by the peculiarities of the transactions. Other contentions relate to the measure of damages—whether the rules of the

exchange adopted by the parties furnish an exclusive method or measure to determine the amount of damages for a breach, and whether in any view the pretended sale offered on behalf of the complainants can be recognized. Underlying these contentions, however, on the indisputable testimony, this paramount question obtrudes itself: Is a valid contract shown, or one which equity will enforce even between proper parties? The importance of the inquiry thus arising is recognized as one affecting a branch of operations which appears to have countenance and extended practice in the commercial world, however infrequently its transactions are brought into courts of equity for adjustment. But it cannot be ignored when the purported contract is presented as the foundation for relief in equity, and neither silence nor acquiescence on the part of the litigants will excuse the court from its determination.

180

Otherwise stated, the question for solution is whether the contract in proof was one of *bona fide* purchase and sale of stock, or was either a mere wagering transaction or a contract in options. In Irwin *v.* Williar, 110 U. S., 499, 508, the general rule governing such transactions is thus declared: "The generally accepted doctrine in this country is, as stated by Mr. Benjamin, that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them; but such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer; and, if under guise of such a contract, the real intent be merely to speculate in the rise and fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void. In Embrey *v.* Jemison, 131 U. S., 336, 344, and in Bibb *v.* Allen, 149 U. S., 481, 492, this doctrine is reaffirmed and in the latter case is well distinguished as showing by the undisputed testimony that actual delivery was not only intended by both parties, but was expressly required by the rules of the cotton exchange governing the transactions.

Aside from the general rule, the contract in question is further subject to such statutory provisions of the State of Illinois as may be found applicable and sections 130 and 131 of the Criminal Code of that State (1 Starr & Curtis An. Stat., 2nd ed., pp. 1293, 1298) read as follows:

"SEC. 130. Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any such commodities, shall be fined not less than $10 nor more than $1,000 or confined in the county jail not exceed-

ing one year or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.

"SEC. 131. All promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages, or other securities or conveyances made, given, granted, drawn or entered into, or executed by any person whatsoever, where the whole or any part of the consideration thereof, shall be for any money, property or other valuable thing, won by any gaming or playing at cards, dice, or other
181 game or games, or by betting on the side or hands of any person gaming, or by wager or bet upon any race, fight, pastime, sport, lot, chance, casualty, election or unknown or contingent event whatever, or for the reimbursing or paying any money or property knowingly lent or advanced at the time or place of such play or bet, to any person or persons so gaming or betting, or that shall, during such play or betting, so play or bet, shall be null and void and of no effect."

These provisions were under consideration in Pearce *v.* Rice, 142 U. S., 28, 40, and were held to invalidate a contract which arose out of grain deals on the Chicago board of trade. Rulings by the supreme court of Illinois in Pearce *v.* Foot, 95 Ill., 99, Lyon *v.* Culbertson, 83 Ill., 33, and Pickering *v.* Cease, 79 Ill., 328, are there cited and applied; and the later cases of Pearce *v.* Foot, 113 Ill., 228, Cothran *v.* Ellis, 125 Ill., 496, Schneider *v.* Turner, 130 Ill., 28, and Soby *v.* The People, 134 Ill., 66, reaffirm such rulings and clearly hold that contracts which purport on their face to be absolute for sale or purchase are within the prohibition of the statute "if the real intention of both parties, at the time of making the contract, was to deal only in options, and make future settlement upon the basis of the difference in the market price, without the actual delivery of the grain or other commodity sold or purchased." (Soby *v.* The People, *supra.*)

Wherever the general doctrine against wagering transactions stands alone as the test of validity, it is well settled in actions at law that a contract of purported purchase and sale will stand upon the presumption which arises in its favor that actual delivery was intended, unless the proof clearly overcomes the presumption and establishes a mutual understanding by the parties that the transaction was a mere speculation in the market price, to be performed only by paying or receiving the amount of rise or fall in the market on the day named for delivery.

In the case at bar there is no substantial conflict in the testimony; and on its face the correspondence between the complainants and their brokers speaks of "sales" of Diamond Match stock for July account, of inquiries for the "difference" demanded to change to August account, and of changes then ordered and reported as made by allowing the "difference." It is not stated in terms by either party that delivery was not intended, nor does it appear in express terms in the correspondence or testimony that there was to be no actual delivery of the stock referred to on the purported sale. On the other hand there is neither averment nor pretense that the sellers had or controlled any shares of the stock, or procured or in-

tended to procure the same for delivery; and it is conceded that they had no stock at any time in the hands of their brokers, and no property in the stock of which pretended tender and sale
182 was made after the alleged default. As the rules of the stock exchange made distinct provision for "closing contracts" so entered into by paying "the difference" in market price, and the operations were conducted under such rules, by parties who were unquestionably acquainted with them, there is surely strong ground to infer an understanding by the parties that such was the contract, and not one of actual sale and delivery; or, as well described in Pearce v. Rice, 142 U. S., 28, 40, that they were "merely to speculate upon the rise and fall in prices, with an explicit understanding from the outset, that the property apparently contracted for was not to be delivered, and that the transactions were to be closed only by the payment of the difference between the contract price and the market price at the time fixed for the execution of the contract."

In discussing the authority conferred upon the broker by the complainants the brief of counsel presented on their behalf contains an interpretation of their contract which clearly discloses their understanding of the matter as above indicated, in the following paraphrase of the terms of these instructions:

"Please sell to whomsoever you think responsible seven hundred shares of Diamond Match stock at $229 per share, to be delivered August 31st. If the person to whom you sell should become dissatisfied with his bargain and you can find some one to take it off his hands at a lower price you are authorized to cancel the original contract and accept the substituted purchaser in the stead of the first purchaser; provided you are paid the difference in money. The money, of course, you will hold to our use. If the second purchaser in turn, should wish to withdraw, and you or he can find some one willing to take the shares at a still lower price, you are authorized to cancel the existing contract, as before, and in like manner to accept the third purchaser; provided you are paid the difference in cash. And this you may do on like terms whenever and as often as you see fit. On the other hand, if the price advances it may be expedient and convenient that we should, if possible, cancel the existing contract (with whomsoever it may be) and obtain a new contract at the current price, in which event you are authorized to pay and charge to our account whatever it costs to obtain such a novation, and this also you are authorized to do whenever and as often as you may deem expedient; for we have carefully studied this matter, and we take it, that by the process indicated, we will be in or out on the day of delivery precisely the difference between our original offer and the then market price."

In equity jurisprudence it is fundamental that "equity looks to the intent rather than to the form" and "will never suffer the mere appearance and external form to conceal the true purpose,
183 objects and consequences of a transaction;" that one who seeks relief must come open-handed with clean hands, and to obtain relief must clearly show that equity and good conscience are with him. In this view it is at least questionable whether relief can

be claimed on the mere form of this contract, resting alone on its presumptive force at common law, without "probing the conscience" of the party for the true object.

We are of opinion, however, that the transaction as disclosed clearly falls within the terms of the Illinois statute above cited, as interpreted by decisions of the supreme court of the State, and that neither the inquiry last suggested, nor the sufficiency of the proof to show a wagering contract under the common-law rule, require decision to ascertain the invalidity of the contract thus disclosed.

In Schneider *v.* Turner, 130 Ill., 28, these provisions are held applicable to a contract relating to the sale of shares of railway stock, and the proposition is refuted that the act merely invalidates gambling contracts, or such "option contracts as contemplate a settlement by differences." It is remarked in the opinion: "If that construction is the true one, why was the statute enacted at all? Nothing is more clearly and firmly established by the common law than that all gambling contracts are void. It is equally well settled that all contracts for the purchase and sale of property, with the understanding or agreement of the parties—whether that agreement is expressed on the face of the contract, or exists by secret understanding—that the property is not to be delivered or accepted, but the contract satisfied by an adjustment of the differences between the contract and market price, are mere wagers or gambling contracts, and void." It is then said that the act intends more than the condemnation of contracts "which were already gambling contracts and void;" that its manifest object "is to break down the pernicious practice of gambling on the market price of grain and other commodities. How is this object sought to be accomplished? There was or is nothing illegal or even immoral in an option contract within itself. The evil aimed at nevertheless grew out of such contracts. As said by Judge McAlister in the opinion referred to in Tenney *v.* Ford: 'In practice on the stock exchange it was often the intention of the parties that no stock should be delivered, but the transaction settled upon differences;' and by Judge Andrews, in the Bigelow case, *supra*, 'Contracts of this kind may be mere disguises for gambling.' In this case the parties might have intended, if appellants called for the stock, to settle on differences. The contract could have been made the disguise for gambling on the future price of stock of the North Chicago City railway. The question is not, Did they so intend? but did not the legislature regard such contracts as lying at the root of the evil aimed at and strike at them. The treatment is heroic, but the evil was most malignant. * * * The contract tested by the statute is void."

184 In the earlier case of Pickering *v.* Cease, 79 Ill., 328, this view is exemplified as follows:

"Agreements for the future delivery of grain, or any other commodity, are not prohibited by the common law, nor by any statute of the State, nor by any policy adopted for the protection of the public. What the law does prohibit, and what is deemed detrimental to the general welfare, is speculating in differences in market values. The alleged contracts for August and September come within this defi-

nition. No grain was ever bought and paid for, nor do we think it was ever expected any would be called for, nor that any would have been delivered had demand been made. What were these but 'optional contracts,' in the most objectionable sense; that is, the seller had the privilege of delivering or not delivering, and the buyer the privilege of calling or not calling for the grain, just as they chose. On the maturity of the contracts, they were to be filled by adjusting the differences in the market values. Being in the nature of gambling transactions, the law will tolerate no such contracts."

So in Pearce *v.* Foot, 113 Ill., 228, 239, it is said:

"Although the statutes being considered are highly penal, there is no warrant for construing them with any unreasonable strictness. They ought rather to have a just, if not liberal, construction, to the end the legislative intention may be accomplished, to prohibit all dealings in options in grains or other commodities. Nothing is productive of more mischievous results. Considerable fortunes secured by a life of honest industry have been lost in a single venture in 'options.' The evil is all the more dangerous from the fact it seemingly has the sanction of honorable commercial usage in its support. It is a vice that has in recent years grown to enormous proportions. Legitimate transactions on the board of trade are of the utmost importance in commerce. Such contracts, whether for immediate or future delivery, are valid in law and receive its sanction and all the support that can be given to them. It is only against unlawful 'gambling contracts' the penalties of the law are denounced, and no subtle finesse of construction ought to be adopted to defeat the end it is to be hoped may be ultimately accomplished."

However the terms "option" and "optional contracts" may be used and defined elsewhere the construction of this statute by the supreme court of the State is controlling here and invalidates the contract upon which the bill of complaint is founded. Such was the ruling in Lester *v.* Buel, 49 Ohio St., 240, where transactions were involved of like character on the Chicago board of trade, and were held to be within the provisions of the Illinois statute, and prohibited as well by a statute of Ohio of like import.

We are of opinion that the bill was properly dismissed for want of equity, and the decree is affirmed.

185 And afterwards, on the same day, to wit, on the third day of October, 1899, in the October term last aforesaid, the following proceedings were had and entered of record, to wit:

TUESDAY, *October* 3, 1899.

Present: Hon. William A. Woods, circuit judge, presiding; Hon. James G. Jenkins, circuit judge; Hon. Romanzo Bunn, district judge.

Before Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. William H. Seaman, district judge.

HENRY CLEWS, CHARLES M. FOSTER, and JAMES B. CLEWS *vs.* MALCOLMB M. JAMIESON, ROLAND C. Nickerson, Henry F. Billings, *et al.*	533. Appeal from the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of Illinois and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

186 And afterwards, to wit, on the nineteenth day of October, 1899, in the October term last aforesaid, came the appellants, by their counsel, Mr. H. D. Estabrook, and filed in the office of the clerk of this court their petition for rehearing, said petition being in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Seventh Circuit, January Session, A. D. 1899.

HENRY CLEWS, CHARLES M. FOSTER, and JAMES CLEWS, Appellants, *vs.* MALCOMB M. JAMIESON, ROLAND C. NICKERSON, HENRY F. BILLINGS, *et al.*, Appellees.	No. 533.

Petition for Rehearing.

To the honorable the judges of the court aforesaid:

Come now appellants, Henry Clews, Charles M. Foster, and James Clews, and petition your honors that a new hearing be al-
187 lowed herein.

Endorsed: Filed Oct. 19, 1899. Edward M. Holloway, clerk.

And afterwards, to wit, on the first day of February, 1900, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

THURSDAY, *February* 1, 1900.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge, presiding; Hon. James G. Jenkins, circuit judge; Hon. Peter S. Grosscup, circuit judge; Hon. William H. Seaman, district judge.

Order.

It is ordered by the court that William H. Seaman, judge of the district court of the United States for the eastern district of Wiscon-

sin, be designated and assigned to sit in this court as a member thereof during the present session. Thereupon said Seaman appeared and took his seat as a member of said court.

And afterwards, on the same day, to wit, on the first day of February, 1900, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

188 THURSDAY, *February* 1, 1900.

Before Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. William H. Seaman, district judge.

HENRY CLEWS ET AL. *vs.* MALCOLMB M. JAMIESON *et al.* } 533. Appeal from the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

It is ordered by the court that petition for rehearing in this cause be, and the same is hereby, overruled.

189 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 188, inclusive, contain a true copy of the transcript of the record and proceedings in the United States circuit court of appeals for the seventh circuit in the case of Henry Clews, Charles M. Foster, and James B. Clews *vs.* Malcomb M. Jamieson, Roland C. Nickerson, and Harry F. Billings *et al.*, No. 533, October term, 1899, as the same remains upon the files and records of the United States circuit court of appeals for the seventh circuit.

Seal United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this third day of March, A. D. 1900.

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

190 [Endorsed:] File No., 17,709. U. S. C. C. of appeals, 7th circuit. Term No., 245. Henry Clews, Charles M. Foster, and James B. Clews, petitioners, *vs.* Malcolm M. Jamieson *et al.* Filed April 9th, 1900.

191 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the seventh circuit, Greeting:

Being informed that there is now pending before you a suit in which Henry Clews, Charles M. Foster, and James B. Clews are appellants and Malcomb M. Jamieson, Roland C. Nickerson, Henry F. Billings, *et al.* are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the northern district of Illinois, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court
192 of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of April, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

193 UNITED STATES OF AMERICA, }
Seventh Circuit. }

In obedience to the command of the foregoing writ of certiorari and in pursuance of the stipulation of the parties, a full and true copy of which is hereto attached, I do hereby certify and return that the transcript of the record filed with the application to the Supreme Court of the United States for a writ of certiorari in the case of Henry Clews, Charles M. Foster, and James B. Clews, appellants, *vs.* Malcomb M. Jamieson, Roland C. Nickerson, and Henry F. Billings *et al.*, appellees, is a full, true, and complete transcript of the record upon which said cause was heard in the United States circuit court of appeals for the seventh circuit, together with all proceedings in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this twenty-first day of April, A. D. 1900.

Seal United States Circuit Court of Appeals, Seventh Circuit.

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

[Endorsed:] Supreme Court of the United States, October term, 1899. No. 595. Henry Clews *et al. vs.* M. M. Jamieson *et al.* Writ of certiorari.

194 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the United States Circuit Court of Appeals for the Seventh Circuit.

HENRY CLEWS ET AL.
vs.
MALCOLM M. JAMIESON ET AL.

It is hereby stipulated by and between the parties hereto that the certified copy of the transcript of record and proceedings in the above-entitled cause in this court, now on file in the Supreme Court of the United States, case # 595, O. T., '99, may be taken as a return to the writ of certiorari heretofore, on the 18th day of April, 1900, issued by the Supreme Court of the United States and directed to this court.

April 20, 1900.

HAMLINE, SCOTT & LORD,
Solicitors for Foreman et al., Governing Com. Chicago Stock Exchange.
SAMUEL P. McCONNELL,
HORACE KENT TENNEY,
Counsel for Malcomb M. Jamieson et al.
HENRY D. ESTABROOK,
Of Counsel for Clews et al.

Endorsed: Filed April 21, 1900. Edward M. Holloway, clerk.

195 [Endorsed:] File No., 17,709. Supreme Court U. S., October term, 1900. Term No., 245. Henry Clews *et al.*, petitioners, *vs.* Malcolm M. Jamieson *et al.* Writ of certiorari and return. Office Supreme Court U. S. Filed July 25, 1900. James H. McKenney, clerk.

IN THE SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1899.

Henry Clews, Charles M. Foster and James B. Clews,
Petitioners,

vs.

Malcolm M. Jamieson, Roland C. Nickerson, Harry F. Billings, Edwin G. Foreman, Charles Henrotin, A. W. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, H. Herbst, Henry C. Hackney, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William V. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, George A. McClellan and A. L. Dewar,
Respondents.

Petition for writ of certiorari, requiring the United States Circuit Court of Appeals for the Seventh Circuit to certify to the Supreme Court for its review and determination the suit of Henry Clews, Charles M. Foster and James B. Clews, appellants, against the aforesaid Malcolm M. Jamieson, Roland C. Nickerson, Harry F. Billings and others, appellees.

To the Honorable, the Supreme Court of the United States:

The petition of Henry Clews, Charles M. Foster and James B. Clews, respectfully shows to this honorable court as follows:

(1.) That this is an unusual case growing out of a not unusual transaction. The transaction was the sale by the petitioners of certain shares of stock for "the account," (*i. e.*, for future delivery) on the Chicago Stock Exchange according to the rules, customs and methods of the exchange.

The case is unusual in that it is the first case arising in the

United States where the rules, customs and regulations of a stock exchange clearing house have come under judicial investigation.

(2.) That the rules, customs and methods of the Chicago Stock Exchange are not peculiar to that institution, but that similar customs and methods obtain among stock exchanges throughout the civilized world. The rules and customs here involved represent the application of the clearing house principle, made familiar through modern methods of banking, to commercial enterprise.

See Jevon's Money and the Mechanism of Exchange, Appleton's Ed., pp. 281 and 282, and note.

See also *Political Science Quarterly*, Vol. 8, No. 2, p. 252, June, 1893, where Mr. Alexander D. Noyes, in an article, says:

"The system of clearing houses for stocks is not new. It was adopted in the New York Stock Exchange only in the early months of 1892, but it has been in existence elsewhere for at least twenty-five years. * * * Ordinarily, in the first experiments, they took the form of the so-called 'ringing out' of contracts in the same security. By this plan, if A sold B a given amount of one security, and if B had presently sold the same amount to C, the series of trades could be personally adjusted between the three traders so that the only actual exchange required would be the transfer of the securities from A to C. *Of course, the number of traders in the series might be extended indefinitely, for the system did not require that the prices at which the trades were made should have been uniform.* * * The first official establishment of this kind in Europe was founded at the Handelskammer of Frankfort, May, 1867, principally for the purpose of dealing in government securities, United States bonds in particular. The Berlin Exchange adopted the system in 1869; Hamburg in 1870; Vienna in 1873, and London in 1876. The Paris Bourse, owing to its peculiar system of limitation on exchange membership, has never established a regular clearing house for stocks, but the same ends are attained by a voluntary comparison of accounts by brokers' representatives, similar in its general workings to the system of bank clearings."

(3.) That the particular transaction giving rise to this controversy differed not at all from innumerable transactions theretofore had on the Chicago Stock Exchange, where stocks had been bought or sold for future delivery, save only in the fact that petitioners sought redress for their grievances in the courts of the land instead of submitting themselves to the *quasi*-judicial tribunal established by the exchange; and this not through any suspicion or misgiving as to the entire fairness of the tribunal of arbitration established by such exchange, but because that tribunal had become, so to speak, *functus officio*, as will hereinafter more fully appear.

(4.) That the points in issue in this application are:

First: Is a contract for the buying or selling of shares of stock for "the account," *i. e.*, for future delivery, on the Chicago Stock Exchange, and according to the rules, customs and regulations of that exchange, a gambling contract *per se?* The United States Circuit Court of Appeals, of its own motion in this suit, held that it is.

Second. Is the clearing house machinery of the Chicago Stock Exchange adequate to bring the vendor of shares of stock, as an undisclosed principal, and the ultimate purchaser of such shares together, so that, notwithstanding the daily novations and substitutions incident to a sale for future delivery on the exchange, there exists, on the day for delivery, a privity of contract between them? The Circuit Court held in this suit that the undisclosed principal in such a contract could not recover from the ultimate purchaser for want of privity. The Court of Appeals did not consider this point at all.

(5.) That if the opinion of the Circuit Court is permitted to stand as the law of the land, it is equivalent to declaring that every one not a member of a stock exchange, desiring to buy or sell stocks for future delivery through members of an exchange with which such stocks are listed, must trust implicitly to the good faith of the members of such exchange for the consummation of the sale or purchase, but that he has no legal remedy or recourse whatever, —not against his own broker, for the latter would only have agreed to buy or sell according to the rules and customs of the exchange of which he was a member and which he would have done; not against the ultimate vendor or purchaser, because he would not, according to the decision of the Circuit Court herein, be privy to the contract between his broker and such ultimate vendor or purchaser.

That if the opinion of the Circuit Court of Appeals is permitted to stand as the law of the land, it is equivalent to declaring that whoever buys or sells shares of stock for future delivery on a stock exchange according to the rules and methods of such exchange, is a gambler *per se;* and your petitioners aver that the result must be either that the stock exchanges of America will adopt different rules, customs and methods, thereby exchanging the telegraph for the dray, or be a law unto themselves; for that by the decision of the Circuit Court of Appeals herein these institutions, confessedly necessary to modern commerce, are judicially branded as outlaws.

(6.) Your petitioners further show unto this honorable court that the only reason given in the opinion of the Circuit Court why your petitioners should not recover in this case is because the rules, customs and methods of the Chicago Stock Exchange, while resulting in a valid and binding contract between the brokers or members of the exchange in whose names the contract was exe-

cuted, did not create a privity in such contract in the undisclosed principals of such brokers or members.

That the Circuit Court of Appeals, without passing upon the question of privity *or any question raised by the pleadings and evidence in this case*, of its own motion affirmed the judgment of the Circuit Court on the ground that every sale for "the account," that is to say, for future delivery, on the Chicago Stock Exchange, according to the rules and methods of such exchange is, and must be, a gambling contract.

That this suit, therefore, is not alone of interest to petitioners, but involves the legality of daily and multitudinous transactions in the sale and purchase of stocks through the different exchanges in the United States, and that it is of the utmost importance to the general public that the rules, customs, usages and methods peculiar to the stock exchange as an institution, should be investigated by this honorable court and their legality or illegality authoritatively and finally determined after an opportunity afforded to the parties interested to be heard on the question.

(7.) Your petitioners further aver that on the 25th day of September, 1896, your petitioners, as complainants, filed in the Circuit Court of the United States for the Northern Division of the Northern District of Illinois their bill of complaint on the equity side of said court against Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings, doing business as a copartnership under the name of Jamieson & Company, and Charles Henrotin, Edwin G. Foreman, A. W. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, H. Herbst, Henry C. Hackney, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William V. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, George A. McClellan and A. L. Dewar, constituting the governing committee of the Chicago Stock Exchange, and against Gustavus A. Schwartz, John Dupee, John W. Conley and Isaac J. Bloom, doing business as copartners under the name of Schwartz, Dupee & Company; that your petitioners, said complainants, were, at the commencement of said suit, citizens and residents of the State of New York, and said defendants were citizens of the State of Illinois, residing in the Northern Division of the Northern District of said State, and jurisdiction of said Circuit Court of the United States was and is dependent entirely upon the opposite parties to said suit and controversy being citizens of different States, and that the matter in dispute in said suits exceeds, exclusive of interest and costs, the sum and value of two thousand dollars.

Your petitioners further show that upon filing said bill of

complaint, a subpœna issued out of the clerk's office, directed to all said defendants, and was placed in the hands of the marshal for service, which subpœna required said defendants to appear in said suit on or before November, 1896, rule day, and which subpœna was duly served upon all said defendants.

(8.) That thereafter each of said defendants entered his appearance, and on the 28th day of November, 1896, the said Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings filed their joint answer to said bill; that on the fourth day of December, 1896, the defendants, Charles Henrotin, Edwin G. Foreman, A. W. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, H. Herbst, Henry C. Hackney, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William V. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, George A. McClellan and A. L. Dewar, constituting the governing committee of the Chicago Stock Exchange, filed their demurrer to said bill, which demurrer was, on the first day of March, 1897, overruled by the court, and said defendants afterward, on the first day of April, 1897, filed their answer to said bill; that on the eighth day of December, 1896, the defendants Gustavus A. Schwartz, John Dupee, John W. Conley and Isaac J. Bloom, filed their joint and several answer to said bill; that said complainants filed replications to all of said answers.

(9.) That afterward, to wit, on the 25th day of April, 1898, your petitioners and the respondents, Jamieson & Company, entered into a stipulation whereby it was agreed that your petitioners might file instanter an amended bill, and the respondents, Jamieson & Company, might file instanter an answer to said amended bill, the answer of the other defendants to the original bill to stand as the answer to your petitioners' amended bill, and the replications theretofore filed to stand as replications to all the answers, and on the same day an order of the court was entered giving effect to said stipulation; and, accordingly, on the 25th day of April, 1898, your petitioners, in pursuance of said order, filed their amended bill in said case, and on the same day the respondents filed their answer thereto.

(10.) That your petitioners' said amended bill, after alleging the jurisdictional facts as above set forth, stated, among other things not material to this application as your petitioners are advised, that they were a copartnership engaged in the business of buying and selling stocks, bonds and securities, under the name of Henry Clews & Company; that the defendants, Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings were a copartnership under the name of Jamieson & Company, conducting the business

of buying, selling and exchanging bonds, stocks and other securities, and also conducting a general brokerage business for the purchase and sale of like properties; that for some time prior to the filing of said bill there existed in the city of Chicago a voluntary association of stock-brokers, known as the Chicago Stock Exchange, which had adopted a constitution and by-laws for its government; that said association was formed for the purpose of opening an exchange where its members could meet together to buy and sell such stocks and securities as should be listed with said exchange, and where its members could make contracts for said sales and purchases under the rules and customs of said exchange; that the government of the exchange was vested in a governing committee, composed of the president of the exchange and twenty-four (24) members; and that during and since the month of July, 1896, the governing committee, duly elected and acting as such, were the defendants, Malcolm M. Jamieson, Edwin G. Foreman, Charles Henrotin, A. W. Wheeler, J. J. Townsend, S. B. Chapin, George E. Wright, H. Herbst, Henry C. Hackney, F. H. Watriss, C. C. Adsit, C. A. Whyland, B. R. Cahn, B. B. Lamb, Charles C. Yoe, William V. Baker, Charles A. Wilson, J. M. Adsit, Frank N. Gage, Fred G. Frank, William B. Wrenn, D. M. Cummings, W. G. Wasmansdorff, George A. McClellan and A. L. Dewar.

Said amended bill further alleged that in the month of July, 1896, your petitioners, complainants in said bill, directed their brokers in Chicago, Schwartz, Dupee & Company, being composed of Gustavus Schwartz, John Dupee, John W. Conley, and Isaac J. Bloom, to sell on account of your petitioners at the rooms of the Chicago Stock Exchange, and in accordance with its rules and customs, seven hundred (700) shares of the capital stock of the Diamond Match Company, a corporation, which stock had been duly listed as one of the stocks which might be sold and purchased in said exchange; and that your petitioners directed said Schwartz, Dupee & Company to sell said shares for delivery on the 31st of August, 1896; that on August 3, 1896, said Schwartz, Dupee & Company sold on said exchange to defendants, Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings, respondents herein, eleven hundred and fifty (1150) shares of the capital stock of the Diamond Match Company, and agreed and contracted to deliver the same to the said Jamieson & Company, or to such persons as might become the assigns of said contract under the rules of said exchange on the 31st day of August, 1896, and the said respondents agreed to accept and receive said stock from said Schwartz, Dupee & Company on the 31st day of August, 1896, at the agreed price of two hundred and twenty-two dollars ($222) per share for each and every share of said stock

That said sales were made by the said Schwartz, Dupee & Company in their names, but therein as to 700 of said shares included in said 1150 shares they were acting for and in behalf of your petitioners, as your petitioners' agents or brokers, and as to the remaining 450 shares the said Schwartz, Dupee & Company were acting on behalf of other clients than your petitioners.

That on the third day of August, 1896, the manager of the clearing house of said exchange being thereto by the rules and by-laws of said exchange duly authorized, delivered to said Schwartz, Dupee & Company a statement showing a sale by said Schwartz, Dupee & Company to the said Jamieson & Company of said 1150 shares of stock, and said manager also delivered to said Jamieson & Company a statement showing a purchase by said Jamieson & Company from said Schwartz, Dupee & Company of said stock.

That on the 31st day of August, 1896, and during business hours provided by the rules, by-laws and customs of said exchange the said Schwartz, Dupee & Company tendered to the respondents certificates for 1150 shares of the Diamond Match Company, duly issued by it, and duly indorsed and transferred so as to vest in the said respondents the title thereto upon delivery thereof, and the said Schwartz, Dupee & Company then and there offered to carry out said contract of sale and offered to deliver said shares of stock to the said respondents, but the said respondents refused to accept the same, and refused to carry out their said contract of purchase, and refused to pay the said Schwartz, Dupee & Company for said stock.

That upon said refusal of said respondents to carry out their contract the said Schwartz, Dupee & Company informed your petitioners of said refusal, and on the 11th day of September, 1896, said Schwartz, Dupee & Company, in writing, notified respondents that said sale as to seven hundred shares of said stock was made by the said Schwartz, Dupee & Company as agents for and on behalf of your petitioners, and notified said respondents that your petitioners might rightfully take any proceeding to enforce said contract of sale, and to make settlement of said transaction as to the said seven hundred shares; that thereupon upon the same day your petitioners notified the said respondents that your petitioners would proceed to sell said seven hundred shares of stock at public auction to the highest bidder, for cash; and that your petitioners would look to said respondents to pay and settle any difference and any loss or damage accruing to your petitioners if said stock should sell for less than the price which the said respondents had agreed to pay therefor. That your petitioners also notified said respondents that in the meantime they held said stock ready for delivery to said respondents upon payment of the amount due on said contract of sale

as to said seven hundred shares, but that the said respondents had utterly refused to pay for and receive said stock, and thereupon your petitioners proceeded to advertise said stock for sale at public auction.

Said amended bill further alleged that on the 22d day of September, 1896, your petitioners offered said stock for sale, at public auction, and the same was struck off to the highest bidder for the sum of one hundred and thirty dollars per share.

Said amended bill further alleged that your petitioners made every reasonable effort by advertisement and by bringing notice of said sale before the public, and before brokers and bankers generally in Chicago and vicinity, to induce persons to bid at said sale, but that your orators were unable to obtain a greater sum for said stock than $130 per share. That on the 31st day of August, 1896, the said shares of stock were worth in the market not to exceed $130 per share, and that your petitioners had suffered damages to the amount of $64,000 by reason of the failure of said respondents to accept and pay for said stock, and that the expense of selling the same at auction was the sum of $46.75.

Said amended bill further alleged that on the 23d day of September, 1896, your petitioners notified said respondents of said sale, and of the amount bid for said stock, and that your petitioners would hold the said defendants liable for the difference between the price agreed to be paid by said respondents for said stock, and the price bid at said auction, and for all other damages which your petitioners had sustained by reason of their (respondents') failure to accept and pay for said stock.

Said amended bill further alleged that at the time said contract for the sale of said stock was made upon the said stock exchange, the said Schwartz, Dupee & Company, as provided by the rules of the said stock exchange, deposited with the clearing house of said stock exchange, the sum of eleven thousand five hundred dollars, being ten dollars per share on the stock sold as aforesaid, in trust as security for the faithful performance on their part and on the part of the clients for whom they were acting, of said contract of sale, and at the same time the said respondents, Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings had also deposited with the clearing house of said stock exchange the sum of eleven thousand five hundred dollars, being ten dollars per share, in trust to secure the faithful performance on the part of said respondents of their contract of purchase of said stock and to pay for the same; and the manager of said clearing house, under the rules and by-laws of said stock exchange, received said sums and the same were, at the time of the filing of the original bill herein, in the control and possession of the governing committee of said stock exchange, naming the members of said committee.

Said amended bill further alleged that on the 24th day of September, 1896, the said Schwartz, Dupee & Company requested the said respondents to consent that the Chicago Stock Exchange pay to the said Schwartz, Dupee & Company seven thousand dollars of the amounts so deposited to secure the performance of said contract, and offered to credit the said respondents with said amount deposited by them, to wit, seven thousand dollars on the damages sustained by reason of the default of said respondents; and that your petitioners, in writing, joined in said request and had offered upon receipt of said amount by Schwartz, Dupee & Company to credit the said respondents with the amount thereof.

That on the 24th day of September, 1896, the said Schwartz, Dupee & Company notified the defendants in said bill, being the governing committee of the said Chicago Stock Exchange, that said contract of sale as to seven hundred shares had been made by them on behalf of your petitioners, and demanded of said Chicago Stock Exchange and its governing committee the payment to them of the amount of said deposits on account of seven hundred shares, to wit, ten dollars per share deposited by Schwartz, Dupee & Company, and ten dollars per share deposited by said Jamieson & Company, and that your petitioners, in writing, concurred in said request.

That said amended bill concluded with a prayer that said respondents might come to a fair and just account of all the losses and damages sustained by your petitioners by reason of the failure of said respondents to accept and pay for said stock; and that said respondents might come to a fair and just account of the amounts deposited in the said Chicago Stock Exchange, as security for the performance of said contract, and that the said respondents might be decreed to pay to your petitioners the amount of said damages; and that said other defendants might be decreed to pay and deliver to your petitioners said trust fund, and that your petitioners might be further and otherwise relieved in the premises according to equity and good conscience.

(11.) That the answer of respondents to said amended bill of your petitioners, or so much thereof as your petitioners are advised is material to this application, admitted that in the month of July, 1896, they, the respondents, constituted a copartnership under the name of Jamieson & Company, and were conducting a business of buying, selling and exchanging bonds, stocks and other securities, and also a general brokerage business for the purchase and sale of like properties. Said answer alleged that in the month of July, 1896, respondents had bought and sold neither bonds, stocks nor securities for themselves, and that the firm of Schwartz, Dupee & Company, mentioned in said bill as the agents of your petitioners,

had been so informed and well knew. Said answer admitted that there was in existence in July, 1896, in the city of Chicago, a voluntary association of stock-brokers known as the Chicago Stock Exchange, as alleged in your petitioners' amended bill.

Said answer denied knowledge on the part of said respondents of the transactions between your petitioners and the said Schwartz, Dupee & Company, referred to in petitioners' amended bill, but alleged upon information and belief that all of the orders which your petitioners gave to Schwartz, Dupee & Company, for the sale of Diamond Match stock by said Schwartz, Dupee & Company, on behalf of your petitioners, during the month of July, 1896, were filled by Schwartz, Dupee & Company before August 1, 1896, by said Schwartz, Dupee & Company, making contracts for such sale and delivery on the stock exchange, and denied that any of said orders had been filled by selling or making contracts for the sale of said stock to the respondents, and denied that respondents were parties to any of the contracts made either in their own names, or on behalf of your petitioners, by Schwartz, Dupee & Company, in executing the orders referred to in said amended bill.

Said answer further denied that on August 3, 1896, Schwartz, Dupee & Company sold on the exchange to the respondents 1150 shares of the stock of the Diamond Match Company, for delivery on August 31, 1896, as in petitioners' bill alleged, or that the respondents agreed to accept and receive said stock; and denied that said respondents did, on August 3, 1896, make any purchase from Schwartz, Dupee & Company, as agents or brokers for your petitioners, of stock of the Diamond Match Company. But said answer admitted that on or about August 3, 1896, the manager of the clearing house of said stock exchange delivered to respondents a memorandum, stating that he had settled all of their trades on the stock exchange of that day, by substituting them as purchasers from Schwartz, Dupee & Company of 1150 shares of Diamond Match stock, and averred that this substitution, if it had any effect, which respondents refused to admit it had, did not substitute the respondents as purchasers in any contract of sale which Schwartz, Dupee & Company had made on behalf of your petitioners, for the sale of Diamond Match stock, either on August 3, 1896, or prior thereto, and that it did not, in any manner, change or affect the contracts which Schwartz, Dupee & Company had theretofore made on behalf of your petitioners, for the sale of Diamond Match stock, but that on the contrary, said substitution was a mere attempt at a settlement of differences of all the sales in Diamond Match stock made on that day by the different members of the stock exchange, including Schwartz, Dupee & Company and the respondents, for the convenience of adjusting transactions between the brokers them-

selves, but without affecting in any way the rights or liabilities of the principals whom said brokers respectively represented, and for whom they had made such purchases and sales. And that the sales of Diamond Match stock, which Schwartz, Dupee & Company had made on August 1, 1896, and which had been made as the basis of the substitution above referred to, were not—except to the extent of fifty shares—sales which they made to the respondents at all, nor were they sales which were made by Schwartz, Dupee & Company on behalf of your petitioners, but that, on the contract, the orders which your petitioners had theretofore given Schwartz, Dupee & Company for the sale of Diamond Match stock had been, prior to that date, filled by Schwartz, Dupee & Company, by making sales to other parties than the respondents, and at a different price than that stated by the manager of the clearing house in the substitution above referred to.

Said answer admitted that on the 31st day of August, 1896, the said Schwartz, Dupee & Company tendered to respondents certificates for eleven hundred and fifty shares of stock of the Diamond Match Company, but disclaimed knowledge on the part of respondents whether or not said certificates were duly issued or whether they were endorsed or transferred so as to vest, if accepted, in the said respondents the title thereto. Said answer admitted, however, the tender of said stock (eleven hundred and fifty shares) and their refusal to accept and pay for the same.

Said answer further disclaimed knowledge on the part of said respondents whether the said Schwartz, Dupee & Company informed your petitioners of said refusal, or not; but said answer admitted that on the 11th day of September, 1896, Schwartz, Dupee & Company, in writing, had notified the respondents that said sale was made by the said Schwartz, Dupee & Company, as agents for and on behalf of your petitioners and had notified respondents that your petitioners might rightfully take proceedings to enforce said contract of sale, and to make settlement of said transaction, and that upon the same day your petitioners notified the respondents that they would proceed to sell said shares of stock at public auction, to the highest bidder, for cash, and that your petitioners would look to the respondents to pay and settle any difference, and any loss or damage accruing to the petitioners, if said stock should sell for less than the price which the said petitioners pretended, and still pretend, that the respondents had agreed to pay therefor.

Said answer further alleged that the respondents had informed Schwartz, Dupee & Company, on the 31st day of August, 1896, and your petitioners on the 11th day of September, 1896, that any contracts which they had made with Schwartz, Dupee & Company, at

any time in the month of July, 1896, had been made for and on account of W. H. and J. H. Moore.

Said answer further averred that as to the public sale of said 700 shares of Diamond Match stock, on September 22, 1896, referred to in petitioners' bill of complaint, that no sale was in fact made by your petitioners, as alleged in their bill, and that your petitioners did not then have or own said stock, but that the sale which they pretended to make was a mere colorable and fictitious one, to carry out which they borrowed from Schwartz, Dupee & Company, or some one else, certain certificates of stock in the Diamond Match Company, which were loaned to them merely for the purpose of using at such fictitious sale; that they had arranged beforehand to have said stock bid in by some one who should appear to be a purchaser thereof, but who was in fact acting on their behalf; that the sale referred to in the amended bill had been made to this man; that no delivery had been made of the stock to him, nor had any money been paid by him for the stock, nor had any change been made in the situation of any of the parties to said sale, either by transfer of the certificates which had been used for that purpose, or by the payment of any money, or otherwise. And said answer alleged that at said sale there was present a *bona fide* bidder, who had offered to pay for 500 shares of said stock $135 a share, but that your petitioners had refused to sell said stock to him, and had carried out their plan of making a fictitious sale thereof at a lower price, to their agent, at $130 per share.

Said answer further denied that your petitioners suffered damages to the extent of $64,000, as claimed in said bill, or that they had suffered any damage, by reason of the failure or refusal of the respondents to accept and pay for said stock.

Said answer admitted that on the 23rd day of September, 1896, your petitioners notified the respondents of said sale, and of the amount bid for said stock, and that your petitioners proposed to hold the respondents liable for the difference between the price which the petitioners had averred, but which respondents denied, was agreed to be paid by respondents for said stock and the price bid at said auction, and for other damages which your petitioners pretended they had sustained by reason of the respondents' failure to accept and pay for the said stock.

Said answer also admitted that about August 3d the said Schwartz, Dupee & Company deposited with the clearing house of said stock exchange the sum of $11,500, and that the respondents also had deposited the sum of $11,500; but it denied that any deposit had been made by the said Schwartz, Dupee & Company, for or in behalf of your petitioners, and averred that said deposits were made by said Schwartz, Dupee & Company and by the respond-

ents under the rules of said stock exchange, and for the security of the respective members of the said stock exchange connected with the substitution of the said 1150 shares.

Said answer admitted that on the 24th day of September, 1896, the said Schwartz, Dupee & Company requested respondents to consent that the Chicago Stock Exchange pay to the said Schwartz, Dupee & Company $7,000, which they then and there pretended had been deposited on account of the said pretended purchase and sale, and offered to credit the respondents with $7,000; and said answer did not deny that your petitioners joined in the request and offer regarding said deposit by said Schwartz, Dupee & Company.

Said answer further alleged that the only purchase of Diamond Match Company stock made by respondents from the said Schwartz, Dupee & Company, in the month of July, 1896, or August, to be delivered August 31st, or any day in that month, was for fifty shares of stock, and alleged on information and belief that said fifty shares of stock were not sold by the said Schwartz, Dupee & Company for your petitioners.

Said answer further averred that on the 3d day of August, 1896, the Chicago Stock Exchange was closed by order of the governing committee thereof, and so remained closed until the 5th day of November, 1896, and that from the said August 3d to the said November 5, 1896, there were no purchases or sales of securities upon the Chicago Stock Exchange.

Said answer further averred that whatever purchases of stock were made, or agreements to purchase, by the respondents, from said Schwartz, Dupee & Company, acting for themselves, or as agents for your petitioners, had been made in view of, because of, and entirely on account of the constitution, by-laws and rules of the Chicago Stock Exchange.

Said answer further stated that by article 17 of the by-laws of the said Chicago Stock Exchange, of which respondents and Schwartz, Dupee & Company were members, it had been provided as follows:

"Should any member neglect to fulfill his contract on the day it becomes due, the party or parties contracting with him shall, after giving notice as required by Section 2 of the preceding article, employ an officer of the board to close the same forthwith in the exchange by purchase or sale as the case may require, unless the price of settlement has been agreed upon by the contracting parties. In case of a failure of a creditor to close the contract as above, the price shall be fixed by the price current at the time such contract ought to have been closed under the rule. In all cases where an officer may be directed to buy or sell securities under this

rule, the name of the member defaulting, as well as that of the member giving the order shall be announced. No order for the purchase or sale of securities under this rule shall be executed unless made out in writing over the signature of the party giving the order, who shall state the reason therefor; and it shall be the duty of the officer who executes the order to endorse thereon the name of the purchaser or seller, the price, and the hour at which the contract is closed, and hand the same to the secretary of the board, who shall within twenty-four hours, ascertain whether the party for whose account the order was given has paid the difference, if any, arising from the transaction; if not, the secretary shall report the default to the president. The duty devolved upon the officers of the exchange under this rule shall be performed without charge. No party shall be permitted to supply offers to buy or sell securities closed for his account under the rule; and when a contract is closed under this rule any action of the defaulter, direct or indirect, by which the prompt fulfillment of such contract is delayed, hindered or evaded to the detriment of the other contracting party, shall subject the offending party to suspension for not less than thirty days in the discretion of the governing committee, by a vote of two-thirds of the members present at the meeting. When contracts are closed out under the rule, any member supplying the bid or offer and not duly receiving or delivering the stock, as the case may be, renders himself liable to prosecution under this article. Should any stock thus sold not be delivered until the next day, the contract shall continue, but the defaulting party shall be liable to pay such damage as may be assessed by the arbitration committee. The same rules as to notice, time and place, that govern defaults in other contracts shall apply to borrowed securities, which on non-delivery or receipt, must be borrowed or loaned in open market, except in case of actual default in receiving or delivering after notice to close the loan; then the same are to be bought or sold, as the case may be, for account of the defaulter in the manner provided in this article."

Said answer further alleged that the notice provided in Sec. 2, of Article 16, and referred to in said Article 17, provided as follows:

"The notice above referred to shall be either personal, or shall be left in writing at the office of the party to be notified, or in case he has no office, then by public announcement, whenever the exchange may be in session."

Said answer further alleged that both buyers and sellers of stock on the stock exchange, were entitled to the protection and advantages afforded by the constitution, by-laws and rules of said stock exchange, and that only upon said stock exchange was it possible in the city of Chicago to obtain a fair or adequate price for

stocks which were covered by contracts of either sale or purchase, made between members thereof. That all contracts for purchase of stock, whether of the Diamond Match Company, or of any other stocks, made between Schwartz, Dupee & Company and the respondents in the month of August, 1896, were made under the by-laws above set forth, and with the agreement that said by-laws should be a part of the contract.

Said answer further alleged that during the time said stock exchange was closed, from the said August 3d until November 5, 1896, there had been no means of carrying out the contracts made between members thereof, for the purchase and sale of stocks and other securities, and that in consequence thereof all purchase contracts had failed, or that settlements thereof must have been deferred until the opening of said stock exchange.

Said answer concluded by submitting to the honorable court, that all and every the matters in your petitioners' bill of complaint mentioned and complained of were matters which might be tried and determined at law, and with respect to which your petitioners were not entitled to any relief from a court of equity.

(12.) The portions of the answer of the governing committee of the Chicago Stock Exchange filed to your petitioners' bill of complaint which your petitioners are advised are material to this application were as follows:

Said answer admitted the formation and purpose of the stock exchange as in your petitioners' bill of complaint set forth and that in the month of July, 1896, they, together with Malcolm M. Jamieson, constituted the governing committee of the said Chicago Stock Exchange.

Said answer further admitted that on or about August 3, 1896, said Schwartz, Dupee & Company had deposited with the clearing house of said stock exchange the sum of $7,000 in trust as security for the faithful performance of a certain contract for the sale of 700 shares of the capital stock of the Diamond Match Company to Jamieson & Company, and that said Jamieson & Company also deposited with said clearing house of said stock exchange the sum of $7,000 to be held by said stock exchange in trust to secure the faithful performance on the part of said Jamieson & Company of their contract to purchase said stock and to pay for the same; that said sums were then in the possession of the governing committee of said stock exchange; that both said Schwartz, Dupee & Company and said Jamieson & Company were then members of said stock exchange, and deposited said sums under the constitution and by-laws of the said stock exchange. There was attached to said answer a copy of said constitution and by-laws marked "Exhibit A," as part of said answer.

(13.) Your petitioners further show unto this honorable court that on the 4th day of May, 1897, on the order of the Hon. John W. Showalter, Circuit Judge, said cause was referred to a master in chancery of said court to take proofs and report the same with his conclusions thereon, and that afterward, to-wit, on the 22d day of January, 1898, said master filed his report; that the master's findings of fact, which your petitioners are advised, are material to this application, were as follows:

"That such rules and by-laws being in force, complainants, on the 16th day of July, 1896, wired their brokers, Schwartz, Dupee & Company, as follows:

'Sell 500 Diamond Match at 220½ for account;' which was done; that later on the same day, said brokers wired complainants as follows:

'Sold 500 Diamond Match at 221⅛ for the account.'

That on the 20th day of July, 1896, said brokers received telegram from complainants, as follows:

'Sell 200 Diamond Match at 221 for the account at opening of market.'

That later on the same day, said brokers wired complainants as follows:

'Sold 200 Diamond Match 221½ for the account.'

That on the 25th day of July, 1896, complainants wired said brokers, as follows:

'Change the Diamond Match over to August account at 2½. If you cannot do it let us know at once.'

That shortly after, on the same day, complainants wired said brokers, as follows:

'You sent us the difference this morning at 2½; at what difference can you do it now.'

That later, on the same day, complainants wired said brokers as follows:

'Change the 500 at 2 cents or better.'

That afterward, and about 12 o'clock on the same day, said brokers wired complainants, as follows:

'Bought Diamond Match 227 for the account; sold 500, 229 account 2d.'

That on July 27th, complainants wired said brokers, as follows:

'Change 200 more Diamond Match 2⅝ or better.'

Later, on the same day, said brokers wired complainants, as follows:

'We changed the 200 Match at 2¼ difference. Will give you price later.'

And, shortly afterward, on the same day, said brokers wired complainant, as follows:

'Bought 200 Match 226¾, account; sold 200 second account 229.'

That these purchases on July account balanced the sales on July account and left the brokers with sales made for complainants of 700 shares of the stock of the Diamond Match Company for the August account; that on the 3d day of August, the clearing department of said stock exchange sent to Schwartz, Dupee & Company, and Jamieson & Company, clearing house sheets, as follows:

'CHICAGO STOCK EXCHANGE,
Clearing Department.

CHICAGO, August 3d, 1896.

Schwartz, D. & Co.:

We have settled all trades on your sheet this day with the following exceptions, which have been substituted:

Bought.	Sold.	Stock.	Price.	Substitution.
	50	W. Chgo.	103¾	Wilson & S.
	150	"	103¾	Wasmansdorff
	1150 Match.		*222*	*Jamieson & Co.*
	100 Bisc.		22	Breeze & Co.
	550 "		92	Spencer.

CHICAGO STOCK EXCHANGE,
Clearing Department.

CHICAGO, August 3, '96.

Jamieson:

We have settled all trades on your sheet this day with the following exceptions which have been substituted:

Bought	Sold.	Stock.	Price.	Substitution.
1150		M.	222	Schwartz.'

That the item '1150 Match 222, Jamieson & Co.,' was made up in part of the 700 shares sold by Schwartz, Dupee & Company, on August account for complainant; that this substitution of Jamieson & Company for the parties to whom such 700 shares had been originally sold was done by the clearing department of said exchange, according to its uniform custom."

"That the method of doing business on said exchange is as follows: At 10 o'clock there is an official call at which the secretary and manager call all the stocks, bonds and securities on the official printed list, and as this call progresses, any member wishing to buy or sell, bids thereon, and the record is made of the transaction; after which there is an irregular call, which closes at half past one, when the manager of the clearing house announces the clearing house or settlement price for the day, which are the closing prices on the exchange for the respective stocks and

securities; that the manager then substitutes trades and sends out cards to all buying or selling on account for the current month, or for the next month; that on the 25th of the month and thereafter until the second day before the end of the month, two calls are made, one for the current month, and one for the next ensuing month, and this is done to allow those who wish to do so to change their accounts over to the next month. That this substitution was made by the clearing department by a system somewhat similar to that employed by the clearing house for banks, that is, that where a broker has purchased and sold during the day the same amount of the same kind of stocks or bonds, his account is balanced by the clearing department, and all margins deposited by such broker may be withdrawn; that when sales and purchases are made by different brokers, one buying and the other selling the same kind of stock or bonds, a substitution is made by the manager of the clearing department, by which it appears that the broker selling has sold such stock, not to the person to whom it was originally sold, but to a person or persons other than those to whom such sales were originally made, and who originally bought of some one else, and that a broker purchasing stock has purchased from some broker other than the broker from whom he originally purchased the same; for instance, if A had sold 100 shares of stock to X, and B has bought the same amount of the same stock from Y, and X and Y's accounts are balanced by other transactions, the substitution would make it appear that A had sold 100 shares to B, and B had bought 100 shares from A, and the names of the parties with whom the original transactions had actually been made by A and B would not appear on the clearing house sheet; that in the transactions on said exchange it is then customary for the parties thus substituted and brought into the relation of buyer and seller with each other by the manager, to assent to the new relations thus formed, and to confirm the transactions as thus adjusted by the manager, and to put up the margins required by the rules, unless margins are already on deposit in the exchange, in which case they are transferred by the manager to the new account."

"That being advised of the substitution on account, as aforesaid, said Schwartz, Dupee & Company, and said Jamieson & Company on said 3d day of August, 1896, exchanged trading cards with each other, on which appears the following:

"CHICAGO, Aug. 3, 1896.

M. Jamieson & Co.:

We hereby confirm sales made by us for the account to-day under the rules of the Chicago Stock Exchange, also substitution trades.

Amt.	Kind of Property.	Price.
	Substitution Trades—Sold.	
1150	Match.	222
	Difference { Collect	
	{ Pay	287 50

(Signed) SCHWARTZ, D. & CO."

"CHICAGO, Aug. 3, 1896.

M. Schwartz:

We hereby confirm purchases made by us for the account to-day, under the rules of the Chicago Stock Exchange, also substitution trades.

Amt.	Kind of property.	Price
	Substitution Trades--Bought	
1150	D. Match.	222
	Difference { Collect	
	{ Pay	287 50

Signed: JAMIESON & CO.

That these cards were handed by the parties receiving them to the clearing house department, so that it appeared at the close of business on said 3d day of August, by the clearing sheet, that Schwartz, Dupee & Company had sold to Jamieson & Company on account, for August, 1150 shares of the stock of the Diamond Match Company, 700 shares of which are the stock in controversy in this case, delivery of which under Rule 2 of the clearing house was to be made on the last day of August, 1896; that Schwartz, Dupee & Company and Jamieson & Company each deposited with the said clearing house seven thousand dollars, as margins on said 700 shares of stock, which amount is still held by the said stock exchange, in trust."

"That on the 3d day of August, 1896, the governing committee, of which defendant Jamieson was then ex-officio president, by virtue of his being then president of said exchange, held a meeting at which the following resolution was adopted, the said defendant, Jamieson, voting in favor of its adoption:

'Resolved, that the exchange adjourn on Tuesday morning, the 4th instant, and remain closed pending further action by this committee.'

That pursuant to said action, said exchange did not open on said August 4th, or thereafter, until the 5th day of November, 1896."

"That on the 31st day of August, 1896, Schwartz, Dupee & Company tendered to Jamieson & Company ten certificates of the stock of the Diamond Match Company for one hundred shares each, and three like certificates for fifty shares each, making 1150 shares of said stock, which said Jamieson & Company examined and refused to receive."

"That when the stock exchange re-opened on the 5th day of November, 1896, Diamond Match stock was sold for cash at 130 and 130½; and that the settlement price for this stock on that day was 129. * * *

"That the lowest price at which said stock has sold since November 5, 1896, was on December 21, 1896, when the price was 108 1-20, and the highest price was on September 17, 1897, when the price was 161½."

"That Jamieson & Company have settled with Schwartz, Dupee & Company for 450 shares of the 1150 shares referred to in the clearing house sheet of August 3, 1897; that such settlement, however, does not include the 700 shares in question in this case."

"That it is admitted by counsel of complainant that the $7,000 put up by Schwartz, Dupee & Company was charged by them to the complainants, and that any claim to that fund which they had has been transferred to complainants; that Schwartz, Dupee & Company have no claim whatever of any kind or character against the $14,000 deposited with said exchange, $7,000 of which was contributed by Schwartz, Dupee & Company, and $7,000 by Jamieson & Company as margins deposited by the parties, respectively, for said 700 shares of Diamond Match stock."

That the master's conclusion of law which your petitioners are advised are material to this application, were as follows :

"That while the contention of defendant's counsel that the constitution, by-laws and rules of the Chicago Stock Exchange are a cunningly devised scheme to enable its members to carry on gambling in stocks and bonds in a systematic manner finds some color in the peculiar methods therein provided for trading and substitution of trades and manipulations of margins, and while gambling transactions may easily be carried on thereunder by disregarding the article forbidding fictitious transactions, yet, as there is no evidence in this case showing, or tending to show, that either of the parties to the original trades or to the substituted contracts, did not intend to deliver and receive the stock of the Diamond Match Company so sold and bought, this transaction can not, under the evidence in this case, be held to be a gambling transaction."

"That by the substitution made in this case, pursuant to the rules of the clearing department, which all the members of the exchange assented to and agreed to be governed by, and by which all

persons directing sales or purchases to be made on said exchange by such brokers are bound, Schwartz, Dupee & Company on the 3d day of August, 1896, sold to Jamieson & Company, and Jamieson & Company bought from Schwartz, Dupee & Company, 1150 shares of the stock of the Diamond Match Company at $222 per share, said stock to be delivered and received on the 31st day of August, 1896, and such contract of sale and purchase was duly ratified by the respective parties on that day, and was thenceforth binding upon both parties to the contract.

"That when substitution of said contract for the sale and purchase of said stock was made, on said 3d day of August, 1896, whereby said Schwartz, Dupee & Company sold, and said Jamieson & Company bought 1150 shares of said stock on the terms aforesaid, there was no legal obligation remaining on the part of the original parties to whom said 700 shares of stock were sold to receive the same from Schwartz, Dupee & Company, or on Schwartz, Dupee & Company to deliver said stock to them; that thenceforth there was a valid and binding contract between Schwartz, Dupee & Company and Jamieson & Company for the sale and purchase of said stock on the terms aforesaid, for the violation of which by either party the other party had its right of action."

"That said complainants, having been the principals for whom said Schwartz, Dupee & Company, as brokers, had sold 700 shares of said stock, which afterward formed a part of the 1150 shares which on the 3d day of August, by substitution and the ratification of both parties, substituted said Schwartz, Dupee & Company sold and said Jamieson & Company purchased for $222 per share, to be delivered and received on the 31st day of August, 1896, said complainants, as such principals, were entitled to maintain an action against said Jamieson & Company for the damages sustained by complainants, because of the refusal of said Jamieson & Company to receive said stock when so, as aforesaid, tendered to them by Schwartz, Dupee & Company."

(14.) Your petitioners further show that the case being further heard on respondent's exceptions to the master's report, and upon certain facts stipulated, your petitioners' bill was, on consideration of said court, dismissed for want of equity. That afterward, to-wit, on the twenty-third day of July, 1898, your petitioners filed a petition for appeal to the Circuit Court of Appeals for the Seventh Circuit, which was duly allowed.

(15.) That, the cause coming on for hearing before said Circuit Court of Appeals on the printed record and briefs of counsel, and on oral arguments, said court afterward, to wit, on the third day of October, 1899, filed its opinion in said case affirming the decree of the Circuit Court, and an order affirming said decree was,

at the October term of said Circuit Court of Appeals, duly entered. A certified transcript of the record in said United States Circuit Court of Appeals is hereto attached, marked Exhibit "A" and made part of this petition.

(16.) Your petitioners further show that in none of the answers, either to your petitioners' bill of complaint or their amended bill of complaint, filed by any of the defendants in said cause, was it charged or intimated that the contract set forth in your petitioners' bill of complaint was a gambling contract, or that your petitioners, or the respondents, Jamieson & Company, had agreed to settle according to differences of price, or that they, or either of them expected so to do. Nor was there any issue of the kind made before the master, nor was there any testimony in the case taken with reference to such an issue; and your petitioners show unto this honorable court that not until the testimony in said case was closed and argument thereon had before the master, were your petitioners apprised or advised that it would be pretended by the respondents that said contract was a gambling contract. Nevertheless, in response, not to any issue made by the pleadings in said cause, but only to the oral argument of counsel for the respondents, the master found that the transaction involved was not a gambling transaction.

(17.) That the finding of the master in this regard was, in effect, affirmed by the Circuit Court, the opinion of his honor, Judge Grosscup, before whom said cause was heard on exceptions to the master's report, reading as follows:

"There can be no question that there came into existence by the transactions stated a contract, whereby, primarily between Schwartz, Dupee & Company and the defendants (being respondents herein) the latter were obliged to purchase of the former, and the former were obliged to sell to the latter, during the month, seven hundred shares of this stock at the price of $222 per share." (See transcript, p. 94.)

Said opinion further declaring as follows:

"The only question is whether complainants (being the petitioners herein) were parties principal to the contract between Schwartz, Dupee & Company and the defendants" (being the respondents herein).

And your petitioners show unto this honorable court that his honor, Judge Grosscup, after declaring the binding force and legal obligation of said contract as between the parties in whose names it was made, to wit, Schwartz, Dupee & Company and the respondents, nevertheless held that your petitioners were not parties principal to the contract between Schwartz, Dupee & Company and the respondents, inasmuch as the evidence disclosed that your peti-

tioners' authority to their said brokers was to sell seven hundred shares of Diamond Match stock at $229 per share, whereas the contract between Schwartz, Dupee & Company and the respondents was for the sale of seven hundred shares of Diamond Match stock at $222 per share, ignoring that by and under the daily novations, customs and methods of said exchange the contract at $222 per share superseded the contract at $229 per share, and that the difference had been paid in money.

And your petitioners aver that the sole and only ground which the trial court in its opinion alleged as sufficient ground why your petitioners should not recover against the respondents, was the alleged want of privity of your petitioners in the contract between the respondents and said Schwartz, Dupee & Company, and that this was the only point discussed or decided by the trial judge.

(18.) That upon argument before the Circuit Court of Appeals, aforesaid, on the appeal of this case to said court, the principal point argued was the said question of privity, counsel for respondents not having raised the question of gambling in their brief filed in said court, and only by way of innuendo in their oral argument before said court. Nevertheless said Court of Appeals, without passing upon the question of privity or any other question raised by the pleadings or arguments in said case, handed down its opinion wherein it affirmed the decree of the Circuit Court, declaring of its own motion as the sole and only reason for such affirmance, that the transaction out of which arose the controversy was a gambling transaction, against public policy, against the statutes of the State of Illinois, illegal and void.

(19.) That the contract in question differed in no particular whatever from innumerable contracts theretofore executed under and in pursuance of the customs, rules and regulations of the Chicago Stock Exchange, and that the rules, customs and regulations of said stock exchange and its methods of executing contracts made in pursuance thereof, differ not at all in principle from the rules, customs, regulations and methods of stock exchanges the world over, and that the particular transaction was in strict conformity with such rules, customs and methods, save only in this, to wit: that because of the closing of said Chicago Stock Exchange on the fourth day of August, by resolution of its managing board, and because being so closed on the thirty-first day of August, 1896, when, under their contract, respondents had agreed to receive and pay for the shares of stock bought by them, your petitioners had recourse to the courts for redress instead of submitting their grievances to the board of arbitration appointed by said stock exchange.

(20.) And your petitioners further show unto this honorable

court that so far as they are aware, or have been able to discover, this is the only case wherein the machinery, methods and customs of the stock exchange clearing house as an institution have been made the subject of judicial investigation in the United States; although in England several cases have grown out of transactions on the London Stock Exchange differing not at all in principle, as your petitioners believe, from the case at bar, and wherein similar customs have been upheld, as reasonable and just; holding further that the process of novations and substitutions growing out of such customs result in a privity of contract between the original seller or purchaser and the ultimate seller or purchaser. Which said English decisions your petitioners, by their counsel, duly presented to both the Circuit Court and the Circuit Court of Appeals, aforesaid, but to which neither of said courts made reference in their opinions.

(21.) That the Circuit Court and the Circuit Court of Appeals have erred as to the law and the facts, and that in law and in fact your petitioners were privy to the contract entered into on their behalf on the third day of August, 1896, by said Schwartz, Dupee & Company with the respondents; and that, in any event, they had ratified and adopted said contract, and were therefore legally entitled to enforce the same, and that the testimony so far from revealing an intention on the part of any one connected with such transaction to gamble (by mutually agreeing not to deliver the shares of stock contracted for but to settle therefor according to the differences in price), shows that no such intention could, by any possibility, have existed, if for no other reason than that until the day of delivery the real parties in interest, to wit, your petitioners and the said W. H. & J. H. Moore were wholly unknown to each other. Although your petitioners respectfully submit that where the question of gambling depends upon intention, such intention is a question of fact to be duly pleaded and found as a fact upon testimony directed to the issue thus raised; further insisting that the specific finding of the master, concurred in by the trial court, that the particular contract out of which arose this controversy was not gambling, ought, in the absence of error of law or mistake in evidence, to be binding on a court of appellate jurisdiction.

(22.) That the questions upon the legal and just construction and effect of the rules, customs and regulations of the Chicago Stock Exchange involved in and presented by the said case of your petitioners, should be authoritatively and finally adjudged by this honorable court upon and after a full presentation to the court of the merits of the said questions upon the part of your petitioners and the respondents.

Wherefore, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Seventh

Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled *Henry Clews, Charles M. Foster and James B. Clews, appellants*, v. *Malcolm M. Jamieson, Roland C. Nickerson, Harry F. Billings, Edwin G. Foreman, Charles Henrotin et al. respondents*, No. 533, to the end that the said case may be reviewed and determined by this court as provided in Section 6 of the act of Congress, entitled "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioners may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this honorable court.

And your petitioners will ever pray, etc.

HENRY CLEWS,
CHARLES M. FOSTER and
JAMES B. CLEWS,
By FRANK O. LOWDEN.
HENRY D. ESTABROOK,
HERBERT J. DAVIS,
Counsel for Petitioners.

HENRY D. ESTABROOK,
Of Counsel for Petitioners.

UNITED STATES OF AMERICA, }
STATE OF ILLINOIS, } ss.

Henry D. Estabrook being duly sworn, says that he is one of the attorneys and of counsel for Henry Clews, Charles M. Foster, and James B. Clews, petitioners above named, and as such had personal charge for them of the case in the foregoing petition mentioned, in the Circuit Court of the United States for the Northern District of Illinois, Northern Division, and in the United States Circuit Court of Appeals for the Seventh Circuit; that he has read the foregoing petition by him subscribed; and that the facts therein stated are true to the best of his information and belief.

Subscribed in my presence
and sworn to before me, this
—day of March, A. D. 1900.

BRIEF AND ARGUMENT.

STATEMENT OF ISSUES.

This suit in equity was brought by the petitioners, Henry Clews & Company, citizens and residents of the State of New York, engaged in the business of buying and selling stocks, bonds and other securities, to have administered and turned over to them fourteen thousand dollars in the possession of the managers of the Chicago Stock Exchange, claimed by petitioners to have been deposited in trust as security for the performance of a contract, entered into August 3, 1896, whereby the petitioners agreed to sell and deliver, and the respondents, Jamieson & Company, citizens and residents of Chicago, Illinois, agreed to receive and pay for, on the thirty-first day of August, 1896, seven hundred shares of the stock of the Diamond Match Company; which contract, it was alleged, Jamieson & Company failed and refused to perform. Petitioners' bill also asked for an accounting of the loss and damages sustained by them on account of the breach of contract, and that Jamieson & Company be decreed to pay to the petitioners the amount ascertained.

It was contended by the respondents, Jamieson & Company:

1. That the contract sued upon was in reality a contract between Jamieson & Company and Schwartz, Dupee & Company, a firm of brokers, citizens and residents of Chicago, Illinois, to which the petitioners, Henry Clews & Company, were not parties and upon which they ought not to recover for want of privity.

2. That the contract sued upon was made through the clearing house of the Chicago Stock Exchange and according to the rules, customs and regulations of said exchange, which said rules provided, among other things, a remedy for breach of every contract made subject thereto, and that the remedy so provided was exclusive.

3. That the testimony offered by petitioners, Henry Clews & Company, proved, at most, nominal damages only.

4. That a bill in equity would not lie, the petitioners having an adequate remedy at law.

The fourth issue specified was raised on demurrer to the bill, which demurrer was overruled and the case was sent to a master to report his findings of fact and conclusions of law. The master's report found all the issues in favor of the petitioners, Henry Clews & Company, and that there was due them from Jamieson & Com-

pany, $64,400. On exceptions to the master's report, and certain new evidence stipulated into the record, the trial judge dismissed the bill of petitioners for want of equity, although his written opinion, set forth in the record, bases the decision solely on the ground of want of privity.

5. On appeal to the United States Circuit Court of Appeals for the Seventh Circuit, the decision of the Circuit Court was affirmed, *not on the only ground which formed the basis of the opinion of that court, nor upon any issue raised by the pleadings or argued in the brief of counsel for respondents*, but because, in the opinion of the Circuit Court of Appeals, the transaction was a gambling transaction and therefore void; leaving petitioners to recover from the stock exchange, as best they might, their money on deposit.

6. The only points discussed in this brief will be the question of privity and the question of gambling.

Statement of Facts and Comments Thereon.

On August 3, 1896, the manager of the clearing house sent to Schwartz, Dupee & Company, a firm of brokers in Chicago, Illinois, members of the Chicago Stock Exchange, a CLEARING HOUSE SHEET, reading as follows:

CHICAGO STOCK EXCHANGE CLEARING DEPARTMENT.

CHICAGO, AUG. 3, 1896.

Schwartz, D. & Co.:

Tr. p. 120. We have settled all trades on your sheet this day, with the following exceptions, which have been substituted :

Bought.	Sold.	Stock.	Price.	Substitution.
	50	W. Ch'go.	103¾	Wilson & S.
	150	" "	103¾	Wasmansdorff.
	1150	*Match.*	*222*	*Jamieson & Co.*
	100	Bisc.	92	Breese & Co.
	550	"	92	Spencer.

The manager at the same time sent a CLEARING HOUSE SHEET to Jamieson & Company reading as follows:

CHICAGO STOCK EXCHANGE
Clearing Department.

Chicago, August 3, 1896.

Tr. p. 109. *Jamieson:* We have settled all trades on your sheet this day with the following exceptions, which have been substituted:

Bought.	Sold.	Stock.	Price.	Substitution.
1150		M	222	Schwartz.

PAGE CUT OFF

On the same day Schwartz, Dupee & Company delivered to Jamieson & Company a TRADING CARD reading as follows:

Chicago, Aug. 3, 1896.

M. Jamieson & Co.

We hereby confirm *sales* made by us for the account to-day under the rules of the Chicago Stock Exchange, also substitution trades. Tr. p. 132.

Amt.	Kind of Property. Substitution Trades. Sold.	Price.
1150	Match.	222
	Difference { Collect	287 50
	Difference { Pay	

SCHWARTZ, D. & Co.

The same day Jamieson & Company delivered to Schwartz, Dupee & Company a TRADING CARD reading as follows:

CHICAGO, Aug. 3, 1896.

M. Schwartz: Tr. p. 133.

We hereby confirm *purchases* made by us for the account to-day under the rules of the Chicago Stock Exchange, also substitution trades.

Amt.	Kind of Property. Substitution Trades.	Bought.	Price.
1150	D. Match.		222
	Difference { Collect		
	Difference { Pay		287 50

JAMIESON & Co.

EXPLANATION: The words "FOR THE ACCOUNT" used in the foregoing documents are technical words. They mean that the shares of stock bought or sold are to be delivered on the account day, *which, under the rules of the exchange, was the last day of the current month.* Tr. p. 38, clearing house rules, Sec. 2.

All trading for "the account" in securities listed on the Chicago Stock Exchange (*i. e.*, every contract for future delivery), was under the rules of the clearing house. Idem, Sec. 1.

On all trades for "the account" the buyer and seller were each required to deposit with the stock exchange clearing house a "margin" of $10 per share on all stocks selling at $100 or over per share, as a trust fund to secure the mutual performance of the contract entered into. Idem, pp. 40 and 41, Secs. 12 and 17.

This trust fund was at all times to be kept unimpaired regardless of the fluctuations of the market, to do which necessitated additional deposits from one of the parties to the contract from day to Tr. p. 37, Art. 16 of the by-laws, Sec. 1; also §§ 2-6, p. 39.

COPY BOUND CLOSE IN CENTER

day, and of course justified the other party in withdrawing from such fund an amount equal to the deposit.

ILLUSTRATION: A agrees to sell and B to buy 700 shares of Diamond Match stock at $223 per share. They each deposit $7,000, *i. e.*, $10 per share. The day following the making of this contract, however, the market price of Diamond Match falls to $222 per share. A's contract, therefore, is potentially worth $1 a share less, and B's is potentially worth $1 a share more than on the previous day. To make good his security, A thereupon deposits $1 per share, *i. e.*, $700, in the trust fund. B, who is only required to keep his security unimpaired, thereupon withdraws $1 per share, *i. e.*, $700, from the trust fund. If on the following day the market returns to $223, B deposits $1 per share, *i. e.*, $700, and A withdraws $1 per share, *i. e.*, $700.

Tr. p. 133, testimony of Wilkins, Mgr. of the Exchange.

This illustration also explains the meaning of the words and figures under the heading "Price" in the foregoing trading cards. The card signed Jamieson & Company indicates that Jamieson & Company were required to pay $287.50 into the trust fund to make good their margin, and the card signed Schwartz, D. & Co. indicates that Schwartz, D. & Co. were at liberty to withdraw from the trust fund $287.50. It is apparent that the figures $287.50, register the fluctuations of the market during the preceding twenty-four hours.

THERE IS NO DISPUTE AS TO THE MEANING OF THESE DOCUMENTS.

Mr. Wilkins, manager of the stock exchange, asked to translate these cards, says, as to the one signed S. D. & Co.: "That card would show that they [Schwartz, Dupee & Company] had no sales and they accepted the substitution which I had given them for 1150 shares of Match at 222, and they [Schwartz, Dupee & Co.] *collected* $287.50."

Tr. p. 133.

As to the card signed Jamieson & Company, Mr. Wilkins says: "That is exactly the same as exhibit 6, except that they [Jamieson & Company] *paid* $287.50. * * * That is, Jamieson & Company say that they have bought 1150 shares of stock at 222 and *paid* $287.50; Schwartz, Dupee & Company say that they have sold 1150 shares of Match at 222 and *collected* $287.50; that balances the stock and balances the money."

Idem, p. 133.

One further explanation is perhaps called for at this time, to be more fully developed hereinafter, as to the meaning of the words "SUBSTITUTION TRADES." Their meaning is indicated in the testimony of Mr. Wilkins quoted. The cards show that neither Schwartz, Dupee & Company nor Jamieson & Company had made any new original sales on August 3, 1896; that the 1150 shares of Diamond Match stock bought and sold by them had been so bought and sold prior to August 3, 1896. They further indicate that the

persons, members of the exchange, to whom Schwartz, Dupee & Company had theretofore sold 1150 shares of Diamond Match stock might be, and probably were, other than Jamieson & Company; and that the persons from whom Jamieson & Company had theretofore purchased 1150 shares of Diamond Match stock might be, and probably were, other than Schwartz, Dupee & Company, *but that irrespective of who such former buyers and purchasers were, the manager of the exchange had novated the contract* by substituting for the persons purchasing from Schwartz, Dupee & Company, whoever they might be, Jamieson & Company, and by substituting for the vendors from whom Jamieson & Company had purchased, whoever they might be, Schwartz, Dupee & Company, *and that both Schwartz, Dupee & Company and Jamieson & Company had assented to the substitution*, THEREBY CANCELING ALL FORMER CONTRACTS WITH WHOMSOEVER MADE AND AT WHATSOEVER PRICE, AND ENTERING INTO A NEW CONTRACT, DATED AUGUST 3, 1896, BY THE TERMS OF WHICH JAMIESON & COMPANY AGREED TO PURCHASE UNDER THE RULES OF THE EXCHANGE 1150 SHARES OF THE STOCK OF THE DIAMOND MATCH COMPANY FROM SCHWARTZ, DUPEE & CO.; THAT THEY AGREED TO RECEIVE SUCH STOCK ON THE 31ST OF AUGUST, 1896, AND PAY THEREFOR THE SUM OF $222 PER SHARE; THAT SCHWARTZ, DUPEE & COMPANY HAD SOLD TO JAMIESON & COMPANY UNDER THE RULES OF THE EXCHANGE, 1150 SHARES OF DIAMOND MATCH STOCK, WHICH THEY THEN AND THERE AGREED TO DELIVER TO JAMIESON & COMPANY ON THE 31ST DAY OF AUGUST, 1896, FOR $222 PER SHARE.

In other words, the cards construed together, and according to the rules, customs and methods of the Chicago Stock Exchange, evidence a contract, *that day executed*, between Jamieson & Company and Schwartz, Dupee & Co., but which was a novation, or a contract substituted for a contract of the day before, to which either Schwartz, Dupee & Co. or Jamieson & Co., or possibly both, had been parties.

[The stipulation of facts entered into after the coming in of the master's report, and to which reference has been made, is simply an attempt to trace from the private books of the brokers, the daily substitutions merging into the contract of August 3.] Tr. p. 76, et seq.

Of this new or substituted contract, his honor, Judge GROSSCUP, in delivering the opinion of the Circuit Court, said: Tr. p. 94.

"There can be no question that there came into existence by the transactions stated a contract, whereby, primarily between Schwartz, Dupee & Company and the defendants (respondents), the latter were obliged to purchase of the former, and the former were obliged to sell to the latter, during the month, seven hundred shares of this stock at the price of 222 per share.

Nor can there be any doubt that the undisclosed principals of

either of these parties were entitled to step into the place of these respective brokers, and in their own name, and for their own benefit, insist upon the enforcement of the contract according to its terms. Clearly, under the rules of the exchange, each of the brokers bound himself, both to the other broker and to the principal whom the broker represented, to carry out the terms of the contract.

The only question is whether the complainants (petitioners) were parties principal to the contract between Schwartz, Dupee & Co. and the defendants. The evidence discloses that their authority to the brokers was to sell seven hundred shares of this stock at 229; and while the authority to sell for more than this might be implied, authority to sell for less could certainly not be. They were entitled, under their contract with Schwartz, Dupee & Company, to a purchaser at 229, or more; they were bound to no sale at a figure less. Neither Schwartz, Dupee & Company, nor any persons with whom that firm had contracted, could have compelled the complainants to deliver the stock at a price less than 229.

But the contract between Schwartz, Dupee & Company and the defendants was for the sale of seven hundred shares at 222. Under the contract between the brokers, the defendants (respondents) could have demanded a conveyance at 222. But of whom could they have made such demand? Certainly not from complainants (petitioners).

Their contract was for 229, and no less.

The devices of the exchange for clearing and counterbalancing accounts between brokers could not, *without their consent*, change so essential a term of the complainants' (petitioners) sale. It can not be that authority from a principal to sell at 229 can, *without his conscious assent*, be transformed into authority to sell at 222. The original understanding that the sale should be made under the rules and practice of the stock exchange can not be interpreted to give such elasticity to the all-important feature of price. *Who would deal on the exchange as principal if it were understood that the prices named had no fixity; that the obligation might be one thing to-day and another totally different thing to-morrow?* While the substitutions, resulting in prices unquestionably different from those originally authorized, bind the brokers participating, they do not, *in the absence of assent*, reach over so as to change the contract rights of the principals. To hold otherwise would be to abolish, by judicial pronouncement, the authority on the faith and stability of which every transaction on the exchange is grounded.

But if the defendants (respondents) under the substitution, could not hold the complainants (petitioners) as principals to the contract for the sale at 222, then for want of mutuality the com-

plainants (petitioners) are in no position to hold the defendants (respondents). There is, indeed, no identity of contract between the one the complainants (petitioners) authorized and the one entered into between Schwartz, Dupee & Company and the defendants (respondents). *That the complainants (petitioners) now choose to accept it is of no significance;* the legal fact remains that they are not so bound, and not being so bound, the defendants (respondents) on their part, are not legally bound.

Whatever legal obligation the defendants (respondents) owe is, under the contract of substitution, to Schwartz, Dupee & Company alone. Between the complainants (petitioners) and the defendants (respondents) there is no privity, and, therefore, no enforceable obligation.

For the foregoing reasons the bill must be dismissed."

The undisputed testimony of Mr. Comstock, connected with the firm of Schwartz, Dupee & Company, in explanation of the clearing house sheet dated August 3, 1896, is as follows: Tr. p. 121.

"Q. Mr. Comstock, on this clearing house sheet appears on line 3, the following: 'Sold 1150 Match 222 Jamieson;' will you state what that 1150 included? A. What it included?

Q. Yes. A. Well, it included the 700 Match sold for Clews & Company and 450 more for other clients."

Cross-examination waived.

It is undisputed testimony also, that on September 9, 1896, Schwartz, Dupee & Company wrote and delivered to Jamieson & Company the following letter: Testimony of Billings, one of the respondents, Tr. p. 107.

"CHICAGO. September 9, 1896.

Messrs. Jamieson & Company, 187 Dearborn St., Chicago, Illinois.

DEAR SIRS: On August 31, 1896, we tendered you seven hundred (700) shares of Diamond Match stock in settlement of sales made by us. The sales made were 500 shares July 25th, and 200 shares July 27, 1896, you being substituted through the clearing house of the Chicago Stock Exchange August 3, 1896, as the purchaser of said stock.

This is to notify you that said sales were made by us as agents for Henry Clews & Co., of New York, who may rightfully take any proceedings to enforce the contracts for said sales, and who are authorized to make settlement thereof.

Very truly yours,

SCHWARTZ, DUPEE & CO."

That on the 10th of September, 1896, Henry Clews & Company, by their attorneys, wrote and delivered to Jamieson & Co. the following letter: Testimony of Billings, Tr. pp. 106 and 107.

"SEPTEMBER 10, 1896.

Messrs. Jamieson & Company, No. 187 Dearborn street, Chicago:

DEAR SIRS—This is to notify you that on Tuesday, the 15th day of September, 1896, at one o'clock P. M., we shall offer for sale, at public auction, to the highest bidder, for cash, at the judicial salesrooms of the Chicago Real Estate Board, No. 57 Dearborn street, in the city of Chicago, county of Cook and State of Illinois, seven hundred (700) shares of stock of the Diamond Match Company, and at said time and place will sell the same to the highest bidder for cash. Said sale will be made for your benefit on account of your contracts with Schwartz, Dupee & Company on the Chicago Stock Exchange for the purchase by you of said shares, *in which contracts the said Schwartz, Dupee & Company were acting as agents of the undersigned*, said shares of stock having been tendered you by Schwartz, Dupee & Company in fulfillment of said contracts on the 31st day of August, 1896.

You are further notified that should said stock at said sale sell for less than the amount due from you on said contracts we will look to you to settle the difference, and we will hold you responsible for any loss on account of said contracts.

The contracts of sale referred to herein are the same mentioned in the letter of Schwartz, Dupee & Company accompanying this notice.

In the meantime we hold said stock ready for delivery to you upon payment of the amount due from you under said contracts of purchase.

Very truly yours,
HENRY CLEWS & CO.,
By Estabrook & Davis,
Their Attorneys."

That other correspondence took place among the parties, set forth in the testimony of said Billings, wherein, prior to the commencement of this suit, Jamieson & Company were informed and advised that Schwartz, Dupee & Company acted for and on behalf of petitioners in the sale of August 3, and that, as principals to said contract, petitioners had ratified and confirmed the same.

We will have occasion to question the legal conclusions of the trial judge from the facts postulated in his opinion; but his statement of facts requires some modification to conform to the evidence in the case.

For instance: Nowhere in the record is there any testimony that Henry Clews & Company *in so many words* authorized their agents, Schwartz, Dupee & Company, to sell Diamond Match stock at $229 per share. It is true that on July 25, 1896, in answer to the request of Henry Clews & Company to change their sales of

Diamond Match from the July to the August account, Schwartz, Dupee & Company *notified* them that they had "bought in" 700 shares of the stock for the July account and had sold 700 shares at $229 per share for the second or August account, and by acquiescing in this sale, of which they were duly notified as aforesaid, they may be said to have authorized it. But the only sales authorized by Henry Clews & Company *in which a specific price was named*, were *prior* to the sale for $229 per share, to wit, on the 16th and 20th of July, 1896, and the prices then named were *less* than $229 per share, to wit, $220½ and $221; *and that which gives significance to all these sales, and which the trial judge apparently lost sight of, is the fact that the sale at $229 per share on July 25, 1896, and the sale at $222 per share on August 3, were different phases of the same transaction, having its origin July 16 and 20. They represent the usual and ordinary mutations of every sale or purchase for "the account" under the rules, customs and usages peculiar to the stock exchange.*

On the 16th day of July, 1896, at 11:19 A. M., Schwartz, Dupee & Company received the following order from Henry Clews & Company by telegram: Tr. p. 117.

"Sell 500 Diamond Match at 220½ for acct.

(Signed) HENRY CLEWS & COMPANY."

On the same day, at 11:35 A. M., Schwartz, Dupee & Company telegraphed Henry Clews & Company as follows:

"Sold 500 Diamond Match at 221⅛ for the account.

(Signed) SCHWARTZ, DUPEE & Co."

On the 20th of July, 1896, at 9:23 A. M., Schwartz, Dupee & Company received a telegram reading as follows: Tr. p. 117.

"Sell 200 Diamond Match at 221 for the account at opening of market. They want put out at opening if possible, but it is good all day.

(Signed) CLEWS."

On the same day at 10:08 A. M., Schwartz, Dupee & Company telegraphed Clews as follows:

"Sold 200 Diamond Match 221½ for the account.

(Signed) SCHWARTZ, DUPEE & Co."

The foregoing is the only correspondence which took place between the petitioners and their brokers, Schwartz, Dupee & Company, until July 25, when Schwartz, Dupee & Company received the following telegram:

"Change the Diamond Match over to August account at 2½ per cent. If you can not do it let us know at once.

(Signed) CLEWS."

Tr. p. 118.

On the same day, at 11:58 A. M., Clews telegraphed Schwartz, Dupee & Company as follows:

"Change the 500 at two cents or better.

(Signed) CLEWS."

On the same day, at 12:11 P. M., Schwartz, Dupee & Co., telegraphed Clews as follows:

"Bought Diamond Match 227 for the account.
Sold 500 229 account 2nd.

(Signed) SCHWARTZ, DUPEE & Co."

On July 27, at 8:55 A. M., Clews telegraphed Schwartz, Dupee & Company as follows:

"Change 200 more Diamond Match 2 per cent or better.

(Signed) CLEWS."

On the same day, at 10:53 A. M., Schwartz, Dupee & Co. telegraphed Clews as follows:

"We changed the 200 Match at 2¼ difference. Will give you prices later.

(Signed) SCHWARTZ, DUPEE & Co."

On the same day. at 10:55 A. M., Schwartz, Dupee & Company telegraphed Clews as follows:

"Bought 200 Match 226¾ account. Sold 200 2nd account 229.

(Signed) SCHWARTZ, DUPEE & COMPANY."

The record shows no other correspondence to have taken place between Clews & Company and Schwartz, Dupee & Company.

Tr. p. 119.

It was stipulated in writing that the orders of Henry Clews & Company, and Schwartz, Dupee & Company contained in the foregoing messages were, as a matter of fact, *executed as set forth in the aforesaid messages from Schwartz, Dupee & Company on the Chicago Stock Exchange.*

EXPLANATION: From the foregoing testimony it is evident that Henry Clews & Company had sold for future delivery 500 shares of the stock of the Diamond Match Company at $221⅛ and 200 shares of said stock at $221½, making a total sale of 700 shares at an average price of more than $221 per share; that they had purchased 500 shares of the same stock for $227 per share and 200 shares of the same stock at $226¾ per share.

If we assume that the brokers of Henry Clews & Company had sold for them the 700 shares of Diamond Match stock to A at $221 for delivery July 31, and had purchased 700 shares of Diamond Match stock from B at $227 per share for delivery July 31, it might save time and trouble if the same broker would, on July 31, bring A and B together, instead of having B deliver to Clews & Company

and the latter deliver to A. And this would obviously be so if A and B were brokers and members of the exchange operating for undisclosed principals.

The stock exchange clearing house is designed for the purpose of facilitating just such transactions and for no other purpose.

We have already pointed out the necessity of a deposit of $10 a share as a trust fund on all shares bought or sold. It follows, therefore, that when on the 16th day of July, 1896, Schwartz, Dupee & Company sold for Henry Clews & Company 500 shares of the stock of the Diamond Match Company for $221 per share, they deposited for and on account of Henry Clews & Company $5,000, and on their sale of 200 shares July 20, they deposited $2,000; but between July 20 and July 25 the market price of this stock appears to have advanced from $221 per share to $227 per share—a potential loss to Henry Clews & Company of $6 per share; therefore Schwartz, Dupee & Company must have deposited in the trust fund between July 20 and July 25, $4,200, in addition to the $7,000 originally deposited.

On and after the 25th day of any month, however, the rules of the Chicago Stock Exchange permit the trading in what is known as the "second account," which, in the case at bar, would be the August account. Mr. Wilkins, manager of the exchange, explains the process of changing from one account to another as follows: Tr. p. 124.

"From the 25th day of any month up to the day before delivery day, which is the day before the end of the month, I call two accounts, first account and second account. The first account is the account of the present month, which in that case would be July; the second account would have been the next account, which would have been August; then on the day before the last day of the month that stops and you go right on to the one account, which is August. Tr. pp. 124 and 125.

Q. These changes or transfers take place then, at what time in the month? A. Any time after the 25th.

* * * * * * * *

Q. Assuming, Mr. Wilkins, that on the 25th day of July, 1896, at 11:41 A. M., a telegraphic order is received from a party in New York by a broker in Chicago, member of the stock exchange, in these words: 'Change the Diamond Match over to August account at two and a half per cent; if you can not do it, let us know at once.' Please explain to the master what is meant there by the two and a half per cent, according to the rules and customs and nomenclature of the stock exchange?

JUDGE MCCONNELL: Objected to. Tr. p. 125; testimony of Wilkins.

A. It would mean that the 500 shares of stock which they had sold for their July account they did not wish to deliver on the

last day of the month, therefore they went in and bought it in for one party and sold it out again for the August account, keeping themselves short the same amount of stock and making that difference, which they would, or at least what they wanted to make, two and a half—what they would make, I don't know.

Q. What is the two and a half per cent? A. Two dollars and a half a share, $250 on every 100 shares of stock for changing, for carrying the stock for another broker for another month.

Q. That would be compensation or commission? A. Interest.

Q. It is the compensation or brokerage of the — A. Hardly called brokerage.

Q. Or commission of the broker? A. It is what one party who has 500 shares of stock—one broker who has 500 shares of stock that he is carrying for a customer and that customer is not prepared to take it up and he is perfectly willing to pay whatever anybody else, who is on the other side of the market will do it for, for carrying it for thirty days.

Q. Supposing, Mr. Wilkins, that a sale of stock is made on the exchange on the 16th day of July, on account; the person who purchases is known at that time to the officers of the exchange, is he? A. Yes, sir; you mean if it is made publicly on the exchange?

Q. I mean if it is made on the floor of the exchange. A. Yes, sir.

Q. Would that person necessarily be the purchaser of that stock or the responsible purchaser of that stock on the account day of that month?

Tr. p. 126; testimony of Wilkins.

JUDGE MCCONNELL: I object to that especially because it involves an expression of a legal opinion; and I stand on that objection.

THE MASTER: Let it go in subject to the objection.

A. No, sir.

Q. All sales or purchases for the account are made through the clearing house as I understand it, to which you have referred? A. All trades made for the account must go through the clearing house."

After the witness is interrogated as to his authority for making substitutions he is asked:

"Q. Please explain to the master and myself the working of that rule. A. It simply says—I can say what it says myself, so as to have what may follow come in line with it. It says that the manager shall borrow or loan stock; it means to say that if you are a member of the Stock Exchange and put in a clearing house sheet on one morning, and in balancing that sheet you are 500

shares—you show that you are 500 shares of Diamond Match long, [*i. e.*, bought], you put that sheet in, and by putting that in with the sheet in the condition it is, it is taken as authority for the manager of the clearing house to borrow that stock for you from somebody else; *that is what the clearing house is for, to save the broker the bother of doing that business himself.* The judge might be another member of the exchange; he might put in a sheet showing that he was short [*i. e.*, sold] 500 shares of Diamond Match, in other words, just the opposite to what you would be, or there might be five different brokers on the floor, each putting in a sheet 100 shares short. If you are long, the manager of the clearing house through his clerks takes every sheet; the sheets must all balance or else the business stops and don't go on until it does balance; so that the stock and differences must balance every day before the summary is made up; therefore, if you are 500 shares of stock long on Diamond Match, there must be somebody in that clearing house who is 500 shares of stock short, or the sheets wouldn't balance; therefore the manager of the clearing house borrows from you, who may be long 500, to supply the judge, if he is short [illegible] or to supply five other men who are short 100 each, and in doing [illegible]t the summary is made up, and they get that notice which you have just referred to.

Tr. pp. 128 and 129; testimony of Wilkins.

Q. That, in effect, Mr. Wilkins, results, does it not, in the substitution from time to time, or from day to day, as the case may be, of a different purchaser or buyer of stock? A. It may or it may not."

COMMENT.

Taking the telegrams of Henry Clews & Company of July 25, and the testimony of Mr. Wilkins together, and we have an example of how a person who has contracted to deliver a number of shares of stock on the account day, is enabled to make an extra profit by granting an extension of time for delivery to the second account day.

ILLUSTRATION: If A, who has agreed to purchase 700 shares of stock and pay for them $227 per share on the 31st day of July, is obliged to borrow money of the bank to meet his obligation he would, ordinarily, be required to pay interest on the money borrowed, hypothecate the shares of stock purchased, and in addition pledge a large amount of collateral. If, therefore, he can induce the vendor to extend the time of delivery thirty days by agreeing to pay him $2 per share extra (for instance), he would, perhaps, prefer to do so, rather than to borrow of the bank. The process is accomplished on the stock exchange by the vendor buying of the vendee at the

contract price and forthwith agreeing to sell him the same number of shares for the second account at the advanced price agreed upon. Mr. Wilkins, in his testimony, denominates this compensation "interest," in analogy, possibly, to what a banker would call it were the same result accomplished by a loan from the bank. We should presume that, legally speaking, it would be a new consideration for an agreement to extend the time of performance. The case we have supposed is an ideal one. In practice, the repurchase by the vendor may be from A and the resale to B through substitutions made by the manager of the clearing house.

Applying the facts evidenced by the telegrams of July 25 to the case at bar and we have:

1. The expressed willingness on the part of Henry Clews & Company to have the time of delivery of the 700 shares of Diamond Match stock sold by them, extended from July 31, that is, from the first account to the second account.

2. Provided, however, that they were paid a certain price for the accommodation.

3. That the 25th of the month was the first day under the rules when such an accommodation could be asked for or would be permitted.

4. That the brokers of Henry Clews & Company were authorized to grant such an extension of time for not less than 2 per cent par value of the stock, *i. e.*, $2 per share.

5. That unless this price or better could be obtained for the accommodation, the purchaser would have no alternative but to accept the stock to be tendered on the 31st, or take the consequences of a breach of contract.

6. That the purchaser was, as a matter of fact, willing to pay the extra compensation and the change was effected by Schwartz, Dupee & Company buying 700 shares of the Diamond Match Company stock at $227 per share for the first account and selling 700 shares of Diamond Match stock at $229 per share for the second account.

7. That the effect of this transaction was to cancel the obligation of Henry Clews & Company to deliver 700 shares of the stock of the Diamond Match Company on July 31 at $221 per share and left them obligated to deliver the same number of shares of said stock on August 31 at $229 per share; that this novation had been brought about in the ordinary course of dealing and had required a cash advance by Henry Clews & Company, or their brokers, Schwartz, Dupee & Company, of $4,200, being the difference on 700 shares of stock between $221 per share, the price sold for on July 16 and 20, and $221 per share, the purchase price on July 25.

8. *That according to the usual course of dealing, on trades for the*

account, it is probable that between July 25 and August 3, there had been substituted for the original purchasers on July 25, at $229 per share, other purchasers from day to day at other prices, the substitutions being made by the manager of the clearing house at his discretion, the parties substituted being notified of the substitution and assenting thereto in writing, and the differences in price being equated by paying into or taking from, the trust fund of $14,000 on deposit.

9. *So that when the contract of July 25 at $229 per share, through these daily novations and substitutions, had merged into the contract of August 3 at $222 per share, all prior contracts had been canceled and annulled; that Jamieson & Company, representing, as it now appears, J. H. & W. H. Moore, had then agreed to purchase the 700 shares of stock sold by Henry Clews & Company, through their brokers, Schwartz, Dupee & Company, and receive and pay for them, on the 31st day of August, $222 per share.*

Testimony of Collins, Tr. pp. 4.

10. *That after August 3, there was no further novation or substitution through the clearing house of the stock exchange, because, by resolution of its board of managers, the exchange, on August 4, closed its doors indefinitely, not opening, as a matter of fact, until November 5 following.*

BRIEF OF ARGUMENT.

I.

A: SCHWARTZ, DUPEE & COMPANY WERE FULLY AUTHORIZED BY CLEWS & COMPANY TO ENTER INTO THE CONTRACT OF AUGUST 3, IN THEIR BEHALF, AND CLEWS & COMPANY WERE BOUND THEREBY; B: BUT EVEN IF UNAUTHORIZED TO ENTER INTO THE CONTRACT OF AUGUST 3, SCHWARTZ, DUPEE & COMPANY IN MAKING IT AFFECTED TO ACT AS AGENTS OF CLEWS & COMPANY; AND THE LATTER RATIFIED THE CONTRACT AND ADOPTED IT AS THEIR OWN; C: AND EVEN IF IT SHOULD BE HELD THAT THE CONTRACT OF JULY 25, AT $229 PER SHARE, HAD BEEN LOST OR DISSIPATED AND IN LIEU THEREOF, SCHWARTZ, DUPEE & COMPANY HAD ATTEMPTED TO SUBSTITUTE THE CONTRACT OF AUGUST 3, AT $222 PER SHARE, CLEWS & COMPANY ARE ENTITLED IN EQUITY TO AVAIL THEMSELVES OF SUCH CONTRACT; D: FURTHERMORE, AND IN ANY EVENT, ALL PARTIES IN INTEREST BEING BEFORE THE COURT, THERE SHOULD HAVE BEEN MADE AN END TO THE LITIGATION BY ORDERING, IF NEED BE, THE FILING OF A CROSS-BILL.

(A) *Horton* v. *Morgan*, 75 Am. D. 326, note.
Maxted v. *Paine*, L. R. 6 Ex. 132.
Hodgkinson v. *Kelly*, L. R. 6 Eq. 496.
Sheppard v. *Murphy*, 16 W. R. 948.
Hawkins v. *Maltby*, L. R. 4 Eq. 572; affirmed on appeal, L. R. 3 Ch. App. 188.
Higgins v. *McCrea*, 116 U. S. 671.
Irwin v. *Williar*, 110 U. S. 511.
Bibb v. *Allen*, 149 U. S. 481.
Dos Passos on Stock Brokers and Stock Exchanges, Chap. 5, Sub-head VII.

(B) *Hagedorn* v. *Oliverson*, 2 M. & S. 485.
Cook v. *Tullis*, 18 Wall. 338.
Shoninger et al. v. *Peabody*, 17 A. R. 279.
Wharton on Contracts, Sec. 2.
Wharton on Agency, Sec. 81.
19 Cent. Law Journal, 482.
Dodge v. *Hopkins*, 14 Wis. 630.
Bank v. *Insurance Co.*, 104 U. S. 54.

(C) *Cook* v. *Tullis*, *supra*.

(D) *Sims* v. *Burk*, 109 Ind. 214.
Chamley v. *Lord Dunsany*, 2 Schoales & Lefroy, 690.

II.

A. THE CONTRACTS OF SALE AS ORIGINALLY ENTERED INTO BY SCHWARTZ, DUPEE & COMPANY ON BEHALF OF CLEWS & COMPANY JULY 16 AND JULY 20 WERE IN ALL RESPECTS CONVENTIONAL, AND BOUND CLEWS & COMPANY TO DELIVER A SPECIFIED NUMBER OF SHARES AT A SPECIFIED TIME AT A SPECIFIED PRICE, AND WERE THEREFORE PRIMA FACIE VALID. B. SUCH CONTRACTS WOULD NOT BE INVALIDATED EVEN IF THE TESTIMONY SHOWED THAT AT THE TIME OF ENTERING INTO THEM CLEWS & COMPANY DID NOT OWN OR CONTROL THE NUMBER OF SHARES OF THE PARTICULAR STOCK CONTRACTED FOR. C. SUCH CONTRACTS BEING PRIMA FACIE LAWFUL COULD NOT BE VOIDED AS WAGERING CONTRACTS BY SHOWING THAT ONE PARTY ONLY SO UNDERSTOOD AND MEANT THEM TO BE. TO VOID SUCH CONTRACTS AS WAGERING CONTRACTS, THE PROOF MUST GO FURTHER, AND SHOW A MUTUAL AGREEMENT AND UNDERSTANDING OF THE PARTIES, COLLATERAL TO THE CONTRACT OF SALE, THAT THE SUBJECT-MATTER OF THE CONTRACT SHOULD NOT BE DELIVERED OR RECEIVED, BUT THAT SETTLEMENT SHOULD BE MADE ACCORDING TO DIFFERENCES IN PRICE. D. AND SUCH COLLATERAL UNDERSTANDING MUST BE PLEADED AND FOUND AS A FACT FROM EVIDENCE DIRECTED TO THE PARTICULAR ISSUE, WITH THE BURDEN OF PROOF UPON THE PARTY SEEKING TO IMPEACH THE TRANSACTION, FAILING WHICH THE COURT IS WITHOUT WARRANT OR AUTHORITY TO IMPUTE UNLAWFUL MOTIVES OR INTENTIONS TO PARTIES LITIGANT; PARTICULARLY WHERE, AS IN THE CASE AT BAR, THERE IS NOT A SCINTILLA OF EVIDENCE INDICATING AN INTENTION TO GAMBLE ON THE PART OF ANY PERSON CONCERNED. E. THE SUBSEQUENT MUTATIONS OF THE CONTRACTS OF JULY 16 AND JULY 20, IN PURSUANCE OF THE USUAL AND CUSTOMARY METHODS OF THE CHICAGO STOCK EXCHANGE, DID NOT OPERATE TO CONVERT A CONTRACT OTHERWISE LAWFUL, INTO A GAMBLING CONTRACT; FOR AT NO SUBSEQUENT PHASE OF THE TRANSACTION WERE CLEWS & COMPANY RELEASED FROM THEIR ORIGINAL OBLIGATION TO DELIVER THE FULL NUMBER OF SHARES CONTRACTED FOR AT THE TIME SPECIFIED, AND BY NO POSSIBILITY COULD THEY RECEIVE FOR THOSE SHARES A GREATER OR LESSER AMOUNT THAN THE SUM ORIGINALLY AGREED TO BE PAID. F. A CONTRACT FOR THE DELIVERY OF A COMMODITY AT A PRICE CERTAIN AND AT A TIME SPECIFIED, IS NOT AN OPTION CONTRACT AND IS NOT, THEREFORE, WITHIN THE OPERATION OF THE STATUTES OF ILLINOIS PROHIBITING OPTION CONTRACTS.

25129

ARGUMENT.

I.

A.—Question of Privity.

If on the 16th or 20th of July, 1896, Henry Clews & Company had wired their brokers in Chicago to sell 700 shares of the stock of the Diamond Match Company at $222 per share, to be delivered July 31, and their brokers, Schwartz, Dupee & Company had truthfully reported that they had sold 700 shares of said stock at $222 per share to Jamieson & Company, to be delivered July 31, *and no change or modification of this contract thereafter occurred until the day of delivery*, at which time the shares contracted for had been tendered and refused, it would scarcely be pretended that an action would not lie by Clews & Company against Jamieson & Company for a breach of contract. The defense of want of privity, under such circumstances, would obviously be unavailing.

If on the 25th of July Henry Clews & Company had wired their brokers to obtain, if possible, an extension of time for delivery to the 31st of August following, and the brokers, having obtained the extension, so reported to their principals, this would have been a novation *sub modo* but would not have changed the mutual obligations of the parties.

A transaction such as the above represents the conventional contract of sale for future delivery *unmodified by any customs or usages peculiar to a stock exchange;* and yet so far as a client is concerned *no practical difference exists.* For in both cases the client simply instructs his broker to buy or sell a specified number of shares at a specified price to be delivered at a specified time; he secures his broker by a pledge of money, collateral, or credit in the one case as in the other; in neither case is he obliged to pay further attention to the transaction until the time arrives for delivery, at which time he delivers or receives the number of shares of stock contracted for, and pays or receives the price per share called for by the contract—no more and no less—or, failing to comply with his contract, is legally amenable for the breach.

It is apparent that so far as the client is concerned it is a matter of indifference whether his contract is executed on a street corner or on the stock exchange, provided, of course, his rights in the latter case be equal to his rights in the former case. He is aware that the stock exchange has methods of doing business peculiar to itself; he has been led to believe that by trading on the exchange rather than on the street, certain advantages will accrue. For instance: The trans-

action will be had with a member of the exchange who is probably acting for an undisclosed principal, but who nevertheless holds himself personally liable (Tr. p. 138, Art. IV; By-laws, p. 123); he is assured that no one can become a member of the exchange until he has been investigated by a committee as to his financial and business standing. To be a member of a stock exchange, therefore, is a valuable credential. He is further given to understand that a ready market is offered for all shares listed upon the exchange, thereby saving the delay and expense of advertising or seeking elsewhere; he is further given to understand that for breach of contract by one of its members it will not be necessary to seek redress in the courts and endure the law's delays or pay the expenses incident thereto, but that prompt redress will be given him, his damages measured by legal standards, and execution enforced out of a trust fund at all times on deposit, or by disciplining the member in default, if need be. (Tr. p. 138, Art. IV; By-laws, p. 137, Art. XV, 131, 133–4.) He is of course given to understand that the stock exchange is, and will be, at all times, a going concern for the attainment of these objects, Sundays and certain holidays excepted. (Tr. p. 138, Art. I, By-laws.)

Now the methods of doing business on the exchange among the members thereof is of no interest to the client if such methods produce the desired results; but if the doctrines announced in the opinions of the Circuit Court and the Circuit Court of Appeals herein are to obtain —if at its caprice a stock exchange can close its doors and cease indefinitely its usual functions, if a contract with one of its members by some hokus-pokus or manipulation is made to evaporate and disappear—if every one consenting to deal with its members according to the rules and usages prescribed by themselves, is to be, not merely in popular tradition, but according to judicial pronouncement, a gambler and a law-breaker—then these institutions should be compelled to adopt different methods or be raided by the police.

If we resist a distinct temptation at this point to enter upon a historical consideration of the stock exchange as an institution—its genesis and centuries of development, it is only because we do not feel called upon to vindicate its morals or its modes of operation. The fact that out of the teeming, ceaseless and illimitable business transacted on the stock exchanges of this country almost from its beginning, this is the first time, so far as judicial records show, that the methods and machinery of the stock exchange have been impeached, is proof conclusive that such methods and machinery have been thoughtfully devised for the protection of legal rights. That these methods and machinery have, in particular cases, been perverted and made to cover gambling transactions, notwithstand-

ing the penalties denounced against such dealing (Tr. p. 137–8, Arts. XVII and XXIX), goes without saying. But that the stock exchange itself, with all its machinery, is as necessary to modern commerce as railways, steamships, telegraphs, money or any other mechanism of exchange, is the deliberate judgment of every writer on political economy; and we respectfully submit that it should be the policy of the courts to bring these institutions and the methods, customs and usages peculiar to them, within judicial ken.

Now while in the case at bar the actual connection of Henry Clews & Company with the Chicago Stock Exchange was most casual, and their interest in *the clicking of its machinery* even more casual, it is true that they had agreed to sell according to the rules, customs and usages of the exchange, and must be bound thereby; but be it understood that the respondents, Jamieson & Company, members of the exchange, must be equally bound. These rules and usages become part of the contract, and this being so, what follows?

In *Bibb* v. *Allen*, 149 U. S. 481, it was said:

"It is settled by the weight of authority that where a principal sends an order to a broker engaged in an established market or trade, for a deal in that trade, he confers authority upon the broker to deal according to any well established usage in such market or trade, especially when such usage is known to the principal and is fair in itself, and does not change in any essential particular the contract between the principal and agent, or involves no departure from the instructions of the principal; provided the transaction for which the broker is employed is legal in its character, and does not violate any rule of law, good morals, or public policy."

In a note to *Horton* v. *Morgan*, 75 Am. Dec. 326, it was said:

"When the client employs a broker of the stock exchange to transact business he *necessarily* gives him the means to carry it through. The broker can, of course, only do this by making the transaction *in accordance with the course of business prevailing in the exchange* and founded upon the rules and usages of the exchange. It results as a natural consequence that the client can not avail himself of his supposed ignorance of the way in which business is conducted by brokers."

Says Mr. Dos Passos, in his work on Stock Brokers and Stock Exchanges, Ch. 5, Sub-head 7, p. 315:

"The last step in the transaction (*i. e.*, a sale for the account) is the actual delivery of the stock or securities by the original seller to the ultimate purchaser. This portion of the business most powerfully illustrates the influence and scope of the usages of the stock exchange upon the contract. * * *

The usages of the stock exchange produce the legal paradox of a vendor selling to a vendee with whom he does not have any

dealings, either personally or through his immediate brokers, and who frequently is not in existence in his character of purchaser when the vendor makes the sale. * * * A stock exchange transaction frequently exhibits a sale made *in præsenti* which takes effect *in futuro*, the place of the first vendee being frequently filled by another person or persons, who may purchase at a price different from that at which the first vendor originally sold.

All these seeming incongruities result from the usages of the stock exchange and the peculiar course of dealing carried on there. But it will be observed that the rights of a vendor are not in any way infringed or diminished by these ramifications of business."

The learned author further says:

"We have seen that a sale may be made either for money or for the account. * * * *If for the account, a vendor who launches a sale upon the exchange knows, or is presumed to know, that his vendee is not necessarily the person to whom his broker originally makes the sale, but may be a different person purchasing for some intermediate jobber at a subsequent date, and to whom delivery is to be ultimately made.*"

In England several cases have arisen which, it seems to us, throw light on the subject. A most thoroughly considered case is that of *Maxted* v. *Paine*, 6 L. R. E. 132, decided in 1871. The methods therein analyzed are but a step removed from the clearing house methods adopted by the London Exchange five years later, and more recently by the Chicago Exchange.

The opinion of Judge Blackburn in this case ought to have especial weight, for the learned jurist, as is well known, devoted much attention to the law of sales. The statement of the case of *Maxted* v. *Paine* taken from the syllabus is as follows:

"The plaintiff having through his brokers on the stock exchange sold to the defendant, a jobber, ten shares in Overend, Gurney & Co., Limited, the defendant on the "name day" passed a ticket to the plaintiff's brokers containing the name of G. as the ultimate buyer. No objection was made to the name, and the plaintiff executed a transfer to G. of ten shares. It was afterward discovered that the brokers named on the ticket as G.'s brokers had been instructed to buy by S., and had, in fact, bought a large number of shares for S. as undisclosed principal. The ten shares in question (the dealings not being for specific shares) were delivered to them as part of the shares so purchased; but the name of G. was passed in pursuance of S.'s instructions, and according to an arrangement by which G., who was a person of no means, consented to allow his name to be passed in consideration of a sum of money paid to him. The purchasing brokers as well as the defendant, were ignorant of this arrangement. Calls having been made on the shares which the plaintiff was compelled to pay, and which he was unable to recover from G., he brought this action to recover them from the defendant."

The principal defense was a novation by which defendant was released. Opinions were delivered by BLACKBURN, SMITH, LUSH, JJ., and COCKBURN, C. J. The opinion of Blackburn covers pages 147 to 181 of the report, from which we have extracted the following:

"All contracts on the stock exchange are made by the members among themselves as principals, and though from the fact that one of the parties is a broker, the other would have good reason to believe that there was an undisclosed principal behind, he would not know that for certain, and the contract would have the effect of making the two members liable to each other as principals. *The undisclosed principals of those two members can at law enforce, and are at law liable for the contracts made by their agents.* * * *

It appears by necessary inference, though not expressly stated, that there was a satisfactory settlement in account between all the various members of the stock exchange through whose hands the ticket had passed *as to the different and probably very different, prices at which they had bought and sold.* On the 13th of April, 1867, more than ten months after the defendant had every reason to believe the transaction was satisfactorily ended, (*i. e.*, that there had been a novation and he was discharged as the original purchaser) the plaintiff, for the first time, brought forward facts then recently discovered by him * * * by which it appears, in brief, that Foster & Co.'s client, Sir Samuel Spry, being desirous of evading the liability which he had instructed Foster & Co. to incur on his behalf, had sought out Goss, a person who, as JAMES, V. C., in *Castellan* v. *Hobson*, expresses it, on account of his vacuity might sing in the presence of a vice chancellor, and paid him forty-one pounds ten shillings to allow his name to be sent in as the transferee. Of course Goss has not paid the subsequent calls; the plaintiff has been forced to do so, and the right of action against Goss having been from the first worthless, he sought for redress. * * *

I think no one can read the above statement without feeling that the plaintiff is entitled to relief from somebody. He has selected the defendant Paine as the person whom he sues. And what we have to determine is whether the defendant is liable. The majority of the court below have held that he is not, and I have come to the same conclusion as the majority of the court, viz., that the judgment should be affirmed; but for reasons of my own, which I think it right to state fully, though the consequence is inconvenient length."

After citing cases intimating that the practice of the stock exchange is no more than machinery by means of which the person buying procures a nominee, the learned judge continues:

"The court of appeal, in each of these cases, determined that the practices and usages of the stock exchange were more than

such machinery, *and made it part of the contract when the sale was for the account, that there should be a novation.*"

The learned judge then goes on to consider what would have been the effect if the sale had been for cash on the exchange, instead of for the account, and adds, p. 159:

"Having said thus much I am now brought to what is the great question in the cause. What difference does it make that the contract was on the stock exchange for the account? I have no doubt that the plaintiff, now seeking to enforce a contract made on his behalf, must take the contract as it really was, *incorporating in it all the usages relative to such contracts.* And the questions, what are those usages, and what is their extent, and what do they mean, are all questions of fact to be ascertained by evidence. But when once they are ascertained the legal effect of the customs upon the contract is a question of law."

Considering this evidence and the rules of the exchange he says, p. 160:

"And I may state at once that, in my opinion, the whole difficulty in these cases as to bargains for the account arises from this, that those who have framed the rules, and those who by putting them in use have established a practice and understanding which ought to regulate the rights of the parties, *have mainly had in contemplation the establishment of a clearing house, for which they have provided with admirable skill,* and they have also provided for other matters *of every day occurrence,* such as the *payment of the price,* and the enforcing of the actual delivery of the transfers, though not perhaps quite so skillfully." * * *

"I will now proceed to state what I understand to be the effect of the rules and usages of the stock exchange. THE GREAT AND MAIN OBJECT OF THE MEMBERS OF THE STOCK EXCHANGE IN ESTABLISHING A PERIODICAL ACCOUNT AND MAKING THEIR RULES AS TO NAME DAYS AND SETTLING DAYS AND TICKETS SEEMS TO ME TO HAVE BEEN THE SAME AS THAT WHICH HAS LED TO THE ESTABLISHMENT OF THE CLEARING HOUSE, AND WHICH I TAKE TO BE THIS, THAT THE NUMBER OF ACTUAL TRANSFERS AND PAYMENTS SHOULD BE REDUCED TO A MINIMUM, AND THAT ALL THAT CAN BE DONE BY SETTING OFF ONE CONTRACT AGAINST ANOTHER, AND SETTLING THEM IN ACCOUNT WITHOUT ANY ACTUAL TRANSFER OR PAYMENT OF CASH, SHOULD BE DONE; AND NOTWITHSTANDING WHAT I CAN NOT HELP THINKING THE MISTAKEN OBJECTIONS OF THE LAWYERS OF THE PAST GENERATION AGAINST SETTLING MATTERS IN ACCOUNT, I THINK THIS IS A LAUDABLE AND CONVENIENT OBJECT.

* * * A member of the stock exchange may also be a broker, who has principals, though their names are never disclosed, and the member of the stock exchange makes the contract as prin-

cipal, and is personally liable as such. If a broker has made only one contract for one constituent to sell, and has made only one contract for another to buy, he will require from the person with whom he has the one contract to sell that he should actually relieve his selling constituent of the shares sold, and he will require from the person with whom he has a contract to buy that he shall actually supply his buying constituent with the shares bought, so that in that simple case there is no room for economy in the number of shares actually transferred. But if, as is very commonly the case, the broker has a speculative constituent who enters into many contracts, some to buy and some to sell, in the hope that he may get a profit from the fluctuation of the market, or if he, the broker, has carried over some of these transactions to the next account, it is obvious that the broker will, on the behalf of that constituent, only wish for the transfer of the balance of such shares.

The interest, therefore, which a broker member of the stock exchange has in establishing the principle of the clearing house is the same in kind, though not so extensive in degree, as that which a jobber member has.

In order, therefore, to effectuate the clearing house object the system of "tickets" has been introduced. The 87th rule requires that the "buyer" of shares, etc., shall pass a ticket for the same containing the names and address of the buyer in full, before twelve o'clock on the name day, either in the stock exchange or at the office of the seller. * * *

The member into whose hands that ticket is passed may either hold it himself or pass it on in furtherance of a contract made with another member. * * *

It is obvious that in carrying out this arrangement it may happen that a member becomes possessed of a ticket for A and B and C shares, when he is under contract to buy from one member A shares, from another B shares, and wishes himself actually to deliver C shares, and consequently wishes to pass to his two sellers two separate tickets for A shares and B shares, respectively, and himself to continue holder of a ticker for C shares. To meet this case a power of dividing or splitting the ticket is given, which is mentioned in the 87th and 91st rules."

Speaking of the exchange of tickets, he says:

"*There may be a great many intervening members between the two. The ticket which the member A holds at the end of the name day, bearing on it the name of the member Z as the original issuer, and which contains the name and address of either a member or a non-member as the person into whose name Z intends the shares to be transferred, may have passed through the hands of as many members as might be designated by all the intervening letters of the alphabet, and may have been split a dozen times;*

and the issuing member may have been a jobber or a broker, and the intervening members may have been brokers or jobbers, or both, and the holding member may be either a broker or a jobber. Still the result will be that the holder of that ticket is brought in contact with the issuer of it, and both must necessarily be members of the stock exchange. * * *

Sandeman & Company, as holders of the ticket, were brought into communication with Foster & Co., as issuers of that ticket, and they mutually dealt with each other as such. I incline to think that in such case the law would imply (or, if not, a jury might, and I would without hesitation find as a fact) that there was a contract between the holder and the issuer of the ticket to perform the reciprocal duties which they owe to each other as such.

This contract, in the language of a pleader before the Common Law Procedure Act, would have been thus expressed: 'In consideration that the holders of the ticket (that is, in this case, Sandeman & Co.), at the request of the issuers (that is, Foster & Co.), promised to treat them as the issuers and perform to them all things which the holder ought to perform to the issuer, they (Foster & Co.) then promised Sandeman & Co. to perform to them all things which the issuer ought to perform to the holder.'

If the parties entering into this contract were agents (as Sandeman & Co. were for Maxted, and Foster & Co. were for Spry) I apprehend their principals, though undisclosed and unknown, would be parties to the contract, and would be subject to the same liability as their agents and entitled to have the same benefit of the contract.

The contract would be implied very much on the same principle as that on which the assignee of a bill of lading receiving the goods is held to contract with the shipowner to pay him the freight originally due from the assignor of that bill of lading.

AND THE CONVENIENCE OF IT IN THE PRESENT CASE MAY BE MADE CLEAR BY SUPPOSING A TO HOLD A TICKET ISSUED BY Z, WHICH HAD PASSED THROUGH THE HANDS OF MEMBERS WHOM WE MAY DESIGNATE BY THE OTHER LETTERS OF THE ALPHABET, AND THAT Z, WITHOUT ANY VALID REASON, REFUSED TO PAY. IF THERE IS NO PRIVITY BETWEEN A AND Z, IT WILL BE NECESSARY IN ORDER TO ENFORCE THE PERFORMANCE OF Z'S DUTY FOR A TO SUE B, B TO SUE C, AND SO ON, TILL ULTIMATELY Y WILL SUE Z, WHO WILL THUS, AT THE EXPENSE OF TWENTY-FIVE LAW SUITS, BE COMPELLED TO PERFORM HIS DUTY BY A PROCESS VERY TROUBLESOME AND COSTLY, WHILST IF THERE IS PRIVITY BETWEEN A AND Z IT MAY BE ENFORCED BY A DIRECT SUIT BETWEEN THOSE PARTIES; AND THIS IMPOSES NO HARDSHIP UPON THE ISSUER OF THE TICKET AS IT ONLY PLACES HIM IN THE SAME POSITION RELATIVELY TO THE HOLDER OF IT IN WHICH HE WOULD HAVE STOOD TOWARD HIS FIRST VENDOR, IF THAT VENDOR HAD NEVER PASSED AWAY THE TICKET BUT HIMSELF DELIVERED THE SHARES DIRECT. * * *

Coles v. *Bristowe* and *Grissell* v. *Bristowe*, seem to me to determine that when the transfers have been delivered to the issuing member and the price is fully paid, there is a novation which frees the member who merely passed the ticket from further liability. And *Coles* v. *Bristowe* further determines that this novation does not arise from the voluntary act of the seller in accepting the substituted liability of a third party in accord and satisfaction of his contract. Coles had in that case taken alarm, and given his broker instructions to complete the transaction with Bristowe direct, and not to recognize any sub-purchasers except as nominees of Bristowe. The evidence as to this will be found at p. 151 of *Coles* v. *Bristowe* in Law Rep. 6 Eq. At p. 14 of the report of the case on appeal, in Law Rep. 4 Ch., Lord Cairns deals with this as an ineffectual attempt to vary a contract already made.

The case therefore decides that it is part of the contract for a sale for the account, that where the price has been paid and the transfers executed to the nominees of the member who issues the ticket, and the transfers have been delivered to the member who issues the ticket, the member passing the ticket is free from further responsibility. * * *

We, sitting in a court of co-ordinate jurisdiction, must hold that there is a 'novatio,' and it only remains open to consider what that 'novatio' is, and subject to what conditions.

It will be seen from what I have written that, in my opinion, the effect of the usage is that the member issuing the ticket is much in the position of one who has issued to his immediate contractor a promissory note, promising to perform to the assign of that promissory note those duties which he would otherwise have had to perform to that immediate contractor.

If there were no custom, the person contracting to take shares would promise to accept from his vendor a transfer, and to indemnify against future calls. The contract on the stock exchange for the account is to supply him on the name day with a ticket which he may either hold or pass on. Each member through whose hands the ticket passes is in a position analogous to the indorsee of that note, and the ultimate assignee who is actually to deliver the shares, is in a position analogous to the holder of that note, and I think that the effect of the custom is that, unless what resembles notice of the dishonor of this note is given within fifteen days (according to the rules), the intermediate indorsers of the ticket are released, and then, and not till then, there is a novatio, in my opinion, between the two members of the stock exchange who are in the position of holder of that ticket and issuer of it. THE STOCK EXCHANGE COULD ONLY REGULATE THE PROCEEDINGS FOR THEIR MEMBERS, BUT IF EITHER OR BOTH OF THOSE MEMBERS WERE AGENTS FOR

OTHERS, THE LAW SAYS THAT THE PRINCIPALS, THOUGH UNDISCLOSED, MAY SUE AND ARE LIABLE TO BE SUED TO THE SAME EXTENT AS THEIR AGENTS, AND NO MORE. AND THERE IS NO HARDSHIP ON EITHER PARTY IN A PRACTICE THUS UNDERSTOOD.

THE ISSUING MEMBER AND HIS PRINCIPAL HAVE NO ADDITIONAL BURTHEN OR OBLIGATION THROWN ON THEM; THE ONLY DIFFERENCE IS THAT THEY ARE LIABLE FOR THE FULFILLMENT OF THE SAME DUTIES TO ANOTHER PERSON. THE PRINCIPAL WHO INSTRUCTED HIS BROKER TO SELL, AUTHORIZED HIM TO CONTRACT WITH ANY MEMBER OF THE STOCK EXCHANGE, AND AFTER THE FIFTEEN DAYS HAVE ELAPSED, HE HAS THE SAME RIGHTS AGAINST THE ISSUER OF THE TICKET, WHO MUST NECESSARILY BE A MEMBER, THAT HE WOULD HAVE HAD AGAINST HIM IF THE CONTRACT HAD BEEN IN THE FIRST INSTANCE MADE WITH THAT MEMBER. AND THE CONVENIENCE AND SECURITY GIVEN TO THOSE WHO PASS THE TICKETS, BY A CUSTOM WHICH SECURES THAT THE FULL EXTENT OF THEIR LIABILITY ON EACH ACCOUNT SHALL BE FINALLY ASCERTAINED WITHIN FIFTEEN DAYS, IS OBVIOUS AND GREAT."

And the learned judge concludes his elaborate opinion in the following words:

"THE WHOLE MACHINERY OF THE STOCK EXCHANGE IS BASED ON THIS, THAT THE MEMBERS DEAL WITH EACH OTHER, AND ARE LIABLE TO EACH OTHER AS PRINCIPALS.

IT SEEMS TO ME THAT THE ULTIMATE NOVATION BY THE CUSTOM MUST BE BETWEEN THE MEMBERS, AND THAT WHEN IT TAKES PLACE IT PUTS THE MEMBER ISSUING THE TICKET UNDER AN OBLIGATION TO FULFILL EXACTLY THAT DUTY WHICH BEFORE THAT NOVATION HE WOULD HAVE HAD TO FULFILL TO THE MEMBER WITH WHOM HE HAD ORIGINALLY CONTRACTED."

The case from which we have thus ventured to quote so extensively decides five points:

1. That a contract for the sale of stock for the account is a contract in which the rules and customs of the stock exchange have been incorporated.

2. That the undertaking of the broker under such a contract is to furnish an ultimate purchaser and not any particular purchaser, or an ultimate buyer and not any particular buyer, as the case may be.

3. That between the date of the original contract and the date of its maturity various persons at various prices may become liable thereunder through a process of novation.

4. That the mere offer of a name, under the rules of the London Stock Exchange, does not work a substitution or a novation unless accepted, but that the lapse of fifteen days without objection conclusively presumes acceptance, releasing the party theretofore liable.

5. That the brokers nominally dealing between themselves are, nevertheless, liable to the undisclosed principals of each, and the undisclosed principals to each other.

In *Hodgkinson* v. *Kelly*, L. R. 6 Eq. 496, which is regarded as the leading authority in England on the subject, A bought of a jobber on the stock exchange shares in a certain company; and afterward (the company in the meantime having stopped payment) B sold to another jobber shares in the same company at a lower price for the same settling day. On the name day A's name was given to B as the purchaser of B's shares. B executed a transfer of the shares to A and delivered the transfer and certificate to A's broker, who paid the price for which A purchased the shares; A afterward repaid his own broker and took away the transfer and certificates, but did not execute the transfer, and it was never registered, in consequence of which B was compelled to pay certain "calls." B brought action against A to indemnify him against all consequences flowing from the ownership of the shares subsequent to the execution of the transfer.

The court, per ROMILLY, M. R., sustained the action, and a decree was entered for the plaintiff, the opinion of the court in part reading:

"It is not, as has been supposed, that the seller of shares constitutes an agent to find out and enter into a contract with some particular buyer, or, on the other hand, that the buyer does the same as to the seller, *but both parties agree to be bound by the usage of the stock exchange, which binds both parties from the beginning, but which leaves each of the parties to the eventual contract ignorant of the other until the day arrives and the instrument of transfer is executed.* It was put in argument as resembling a contract by which A sells to B, B to C, C to D and D to E; and at the request of B, C and D, A executes the transfer to E; but, in truth, this does not appear to me to put the case sufficiently high. IT IS, IN MY OPINION, AN ENGAGEMENT ENTERED INTO BY A ON ONE SIDE, AND E ON THE OTHER, THAT THROUGH THE INSTRUMENTALITY OF CERTAIN OTHER PERSONS, WHOEVER THEY MAY BE, CERTAIN SHARES SHALL BE SOLD AND BOUGHT, AND THEY UNDERTAKE TO COMPLETE THE CONTRACT WITH THE PERSON, WHOEVER HE MAY BE, WHO BUYS ON ONE HAND AND SELLS ON THE OTHER."

The court held that these usages were founded on common sense and common honesty, and that it was of no importance to A to know to whom his shares are to be transferred, nor is it to B to know from whence the shares come.

The machinery of the clearing house while seemingly complicated is, like nearly all machinery, very simple in its principles when once understood. IT MEANS A CONVENTIONAL CONTRACT OF

SALE FOR FUTURE DELIVERY NOVATED EVERY DAY UNTIL THE DAY OF DELIVERY. Here is all the mystery there is to it.

There can be no doubt that a party contracting in his own name and on his own account has the legal right to novate a contract every hour of the day and every day in the week, substituting a new contract for the one canceled; *and it seems to us equally clear that what a person can thus do for himself, he can authorize another to do for him and be equally bound by the acts so authorized.*

Let us assume that on July 25, 1896, Schwartz, Dupee and Company had received from Clews & Company a telegraphic message reading substantially as follows:

"Sell to whomsoever you think responsible 700 shares of Diamond Match Stock at $229 per share, to be delivered August 31st. If the person to whom you sell for any reason desires to subsequently cancel the contract and you can find some one to take it off his hands at a lower price, you are authorized to cancel the original contract and accept a substituted purchaser in the stead of the first purchaser, provided you are paid the difference in money. The money, of course, you will hold to our use. If the second purchaser in turn should wish to withdraw, and you or he can find some one willing to take the shares at a still lower price, you are authorized to cancel the existing contract, as before, and in like manner accept the third purchaser, provided you are paid the difference in cash. And this you may do on like terms whenever and as often as you may see fit. On the other hand if you deem it expedient to cancel the existing contract with whomsoever it may be, and obtain a contract at an advanced price, you are authorized to make such a novation and to pay and charge to our account whatever it costs to obtain such a contract and this you are also authorized to do whenever and as often as you may deem expedient."

Now, however unusual such instructions may sound in the ears of the lawyer accustomed only to the conventional relationship of principal and agent, it can not be said that there is anything vague or indefinite or dubious about the language employed. The meaning is plain. Neither is there anything wicked, unlawful or *dolus malus* about these instructions. The only question is, can the instructions be carried out so that at all times there will exist between the principal and the person with whom the agent contracts the relationship of vendor and vendee with a privity of contract?

Assume that the agent attempts to carry out these instructions. On July 25, 1896, he sells as instructed, but in his own name, without disclosing his principal, 700 shares of Diamond Match stock to A at $229 per share, to be delivered August 31st. That the undisclosed principal would have a right of action against A for breach of this contract will not be disputed. On July 26th,

however, A comes to the agent (the ostensible principal) and asks to recede from his contract, stating that B will take it off his hands at $228 per share, and that he (A) will pay the difference in cash. The agent looks at his written instructions to see if he is authorized to make such a novation. He finds the authority plainly given, in so many words, and so he consents to the arrangement, cancels the contract with A, receives the difference in price, to wit $1 per share, which he holds to the use of his principal, and enters into a new contract with B for $228 per share. *Can it be doubted that thenceforth there is the same privity between the undisclosed principal and B that had the day before existed between A and the undisclosed principal? The authority given to the agent was a continuing authority. It was as much a sanction of his particular act as though special instructions had been given him respecting the identical transaction.* If, therefore, on July 27th, B should come to the agent and request the privilege of withdrawing from his contract, offering as substitute C, who would take it off his hands at $227 per share, and should moreover offer to pay the difference in cash, the agent would have ample power to make the novation; for if he could make it once he could make it twice, and if he could make it twice he could make it every day in the month until the very day of delivery.

Assuming, then, that on August 3, C should come to the agent (the ostensible principal) and should ask consent to recede from his contract, offering Jamieson & Company as substitutes at $222 per share, agreeing to pay the difference in cash, would not the agent have authority to cancel the contract with C and enter into a new contract with Jamieson & Company at $222 per share, receiving the difference in price in cash, to the use of his principal, so that there should be thenceforth an absolute privity of contract between them (the principals) and Jamieson & Company?

The instructions actually given by Clews & Company to their agents, Schwartz, Dupee & Company, in the case at bar, were in all respects similar to those which we have assumed, and Schwartz, Dupee & Company did, under their instructions, only what they were authorized to do. To be sure, their instructions were not written out *in extenso*, but they were just as explicit, just as full, just as easy of comprehension, as though they had been.

In the English cases there have been several attempts to set forth the precise terms of the contract between a broker and his client on a trade for the account under the rules and usages of the stock exchange.

In *Sheppard* v. *Murphy*, 16 W. R. 948, which was an action in equity brought by the vendor against an ultimate purchaser, the court held, in answer to the argument that there was no privity be-

tween the plaintiff and the defendant, that the nature of a transaction on a stock exchange by which a vendor of securities was brought into contact with an ultimate purchaser, was not a contract between the possessor of a thing at the time and another party for the delivery of a specific thing, but a contract that the person who enters into it shall, upon the day on which it is to be performed, procure persons to do a thing that he undertakes shall be done, and that upon that occasion the person who is to receive this thing, and not until that day, shall pay these persons, and not the person who has made the bargain at all.

If we might venture to express the terms of the contracts between a broker and his principal, and between a broker and the fellow broker with whom he deals in a trade for the account, and in view of the rules, customs and usages of the Chicago Stock Exchange, we would say, that every stock broker, in effect, promises to give to his principal on the day of delivery the name of a purchaser, or the names of purchasers, as the case may be, a member or members of the exchange, contracting to receive and pay for the number of shares which the principal ordered sold at the price authorized, or at a different price; *provided*, however, that if the price to be paid by the purchaser or purchasers named is *less* than the price authorized, the broker will have on hand to the credit of his principal the difference in money; and *provided*, further, that if the price to be paid is *more* than the price authorized, the principal will have paid to the broker the difference in money. The principal on his part agrees, in effect, to accept the purchaser or purchasers so tendered, on the terms proposed and deliver to him or them the certificates of stock. Between themselves the brokers mutually agree that they will account to each other, or with those whom they may designate as principals, on the day of accounting.

B.—Ratification.

If we assume with the lower court that the only contract authorized by Clews & Company was the sale of 700 shares of Diamond Match stock, at $229 per share, and that therefore the sale of August 3d, at $222 per share, was not sanctioned by the appellants, it is evident that the appellants are here seeking to ratify and adopt the latter contract, which their agents, however unauthorized, assert to have been made on appellants' account.

But the trial judge, after holding that the appellants could not have been bound by the action of their agents (inasmuch as such action was unwarranted), further holds that the appellants could not even *ratify* the unauthorized act of their agents. His language is as follows:

"But if the defendants, under the substitution, could not hold the complainants as principals to the contract for the sale at $222, *then for want of mutuality the complainants are in no position to hold the defendants.* There is, indeed, no identity of contract between the one the complainants authorized and the one entered into between Schwartz, Dupee & Company and the defendants. *That the complainants now choose to accept it is of no significance;* the legal fact remains that they are not so bound, and not being so bound, the defendants, on their part, are not legally bound."

We respectfully submit that this logic would do away entirely with the doctrine of ratification. Ratification presupposes an unauthorized act on the part of an agent. It presupposes that the principal is not bound *ab initio*. Consequently it presupposes that there is a time, a *locus penitentiæ*, so to speak, when there is no privity or mutuality between the principal and the party with whom his agent affected to contract in his behalf. The contract in all such cases is, pending ratification, a contract between the agent and the other party. But we have read our text books to little purpose if the law does not give the option to the principal, under such circumstances, to either repudiate or ratify the contract. If he ratifies he adopts, as his own, the contract made by his agent and assumes it *cum onere*, that is to say, subject to all defenses which could be made in any suit by the agent himself. After ratification the principal, of course, is bound, and so is the party with whom his agent contracted. Thenceforth there *is* a privity. Indeed, *by fiction of law the ratification relates back to the very inception of the contract.*

The objection urged by the trial judge would apply equally to the contract of an infant who, apparently, is bound or not bound according to his caprice. And yet, as pointed out by Mr. Wharton (Contracts, Sec. 2), the want of mutuality must inhere in the contract itself in order to avoid it, and not depend upon the mere contingency that it may, or may not, be avoided.

Speaking on this subject he says (Idem):

"It is also said that exceptions to the rule requiring mutuality are to be found in cases where one of the parties can defend under the statutes of fraud, and in cases where an agent turns out to be acting for a principal subsequently disclosed. But in all these cases the question of liability is raised by confession and avoidance; and if we are told that there is no contract in such cases, we must hold that there is no contract in any case in which one of the parties could interpose a good defense, no matter what that defense may be. *In all these cases also the ratification* (or non-repudiation, as it is more properly called) *does not start a new contract; it merely confirms a contract already existing.*"

In commenting on the case of *Hagerdorn* v. *Oliverson*, 2 Maule &

S. 485, where an unauthorized person, acting as a *negotiorum gestor*, obtained an insurance on a ship for the benefit of the owner, and the ship was subsequently lost, and where it was held that the owner could afterward ratify the insurance, though he would not have been bound to have paid the premium, Mr. Wharton observes (Agency, Sec. 81):

"At the first glance this would appear to have been a case in which the owner was able to play fast and loose; to say, 'If the vessel is lost, I am insured; if she is not lost, I am not insured.' But this view is only superficial. Though *personally* the owner might have had this choice, *the contract itself was absolute.* The insurer, who insures a ship in consideration of a premium paid in, agrees to do something for a valuable and adequate consideration. *He insures for whomsoever it may concern.* His duties are fixed on the closing of the contract. * * * Whether the owner can sue upon the contract is a mere matter of form, for the agent can sue in case the principal can not. The insurer has lost nothing by the fact of the agent being unauthorized; he has been lulled into no false security; no intervening rights have been sacrificed by him. He insured the vessel on his own terms, and by those terms he is bound.'"

Justice FIELD, in *Cook* v. *Tullis*, 18 Wall. 338, observes:

"The general rule as to the ratification by one of the unauthorized act of another respecting the property of the former, is well settled. The ratification operates upon the act ratified *precisely as though authority to do the act had been previously given*, except where the rights of third parties have intervened between the act and ratification. * * *

"As is said in one of the cases cited by counsel, * * * 'the ratification is the first proceeding by which he (the principal ratifying) *becomes a party to the transaction;* he can not acquire or confer the rights resulting from that transaction unless in a position to enter upon a similar transaction himself.' Thus, if the individual pretending to be the agent of another should enter into a contract for the sale of land for his assumed principal, it would be impossible for the latter to ratify the contract if between its date and the attempted ratification he had himself disposed of the property."

A suit begun by the principal upon the contract of his agent has uniformly been held to be a ratification. The case of *Shoninger et al.* v. *Peabody*, 17 Atlantic Rep. 279 (a Connecticut case, decided in 1889), will serve as an illustration of the general doctrine. An agent of a piano firm, operating a branch store under a salary and a contract for commission, sold to the defendant a piano, with the agreement that the defendant should pay for it in commissions as a stock broker in various transactions between him and the defendant. To his principals, the plaintiffs, the agent reported the piano

as rented to the defendant. After the defalcation of the agent and the winding up of his business, the plaintiffs learned of the true nature of the transaction. They were evidently poorly advised, for instead of repudiating the transaction and seeking to recover the property in replevin, or its value in trover, they sued in assumpsit for the agreed price. Said the court, per LOOMIS, J.:

"The manifest wrong and injustice perpetrated upon the plaintiffs by the defendant and Day (the agent), make us regret that the principles of law applicable to the remedy chosen by the plaintiffs are not flexible enough to afford relief. * * * The whole trouble in this case arises from a mistake as to the plaintiffs' remedy. When the plaintiffs were informed of the terms of the contract made by their agent for the sale of the piano to the defendant, they had an election to repudiate the arrangement, and, by tendering back what they had received in ignorance of the terms of the sale, and demanding the piano, they could have recovered it by an action of replevin, or obtained its value in trover. But, knowing the terms of the sale, they elected to sue in assumpsit on the contract for the agreed price, and thereby they affirmed the contract and ratified the act of the agent, precisely as if it had been expressly approved upon being reported to them by the agent or the defendant; and in contemplation of law *a subsequent ratification and adoption of an act has relation back to the time of the act, and is tantamount to a prior command.*"

It is true the doctrine announced by his honor, Judge GROSSCUP, is supported by Mr. Mechem in his work on Agency, Sec. 179, where the learned author says:

"If an agent, without authority, enter into a contract with another, by which, on account of such lack of authority, the alleged principal is not bound, the principal can not, when he afterward finds that the contract is advantageous to him, affirm the contract so made and compel the other party to perform it on his part."

The reason which the author assigns for the rule announced, is the same as that given by Judge GROSSCUP, and is as follows:

"As a rule the obligations of a contract must be mutual; both parties must be bound or neither. Hence, if the contract made by the agent was not binding upon the principal because of the agent's want of authority, the contract lacks this element of mutuality and the principal not being bound the other party is free also."

The principal case cited by the author in support of his doctrine is *Dodge* v. *Hopkins*, 14 Wis. p. 630. This case has been criticised by Mr. Freeman in a learned note to *Atlee* v. *Bartholomew*, 5 Am. State Reports, p. 109, and defended by Mr. Mechem in an article in the 24th American Law Review, p. 580; criticised in an

article in the 25th Am. L. R., p. 74, and in an article in the 9th Harvard L. R., p. 64.

From the article in 25th A. L. R., p. 74, we quote as follows:

"The writer believes the correct doctrine to be that announced by Mr. Wharton.

"It is the only view which allows full force to the maxim, '*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.*' On all hands it is admitted that the ratification of the principal relates to the time of the contract and is equivalent to a previous authority to the agent. From the ratification the principal becomes, for all purposes, bound by the contract from the time of its execution. If, then, the other party be not bound from such time, the ratification is not, as to such party, equivalent to a previous authority. The maxim in such case would be only half-way true. No such right accrues to the principal as would have accrued to him had there been a prior command, and no such liability devolves upon the other party as would have devolved upon him had there been a prior command. At the same time the same liability devolves upon the principal as would have devolved upon him had there been a prior command, and the same benefits accrue to the other party as would have accrued to him had there been a prior command. But this is not mutuality and mutuality is the essence of Mr. Mechem's rule. Thus, in a very important sense, such ratification is not equivalent to a previous authority. Had there been a previous authority both parties would have been bound from the time of the contract.

"But, Mr. Mechem objects, 'as a rule the obligations of a contract must be mutual; both parties must be bound or neither.' Yes, this is the rule, but there are numerous exceptions to it; or, more properly, this is a generalization inapplicable at times to many cases. Why may not the present case be one of them?

"Let us suppose for a moment that it is not. Then the argument of Mr. Mechem is suicidal. The sword has two edges and cuts both ways. He maintains that the principal is bound from the time of his ratification, but the other party is not bound until his own subsequent ratification. During the time that elapses between these ratifications the principal is bound while the other party is not. But where is the mutuality of this? He maintains that the principal can not by his ratification 'bind the other party also to the contract.' How, then, can the other party by his ratification bind the principal to the contract? Where is the mutuality of this? Ratification is an *agreement*, express or implied, to adopt an act performed by another for us.

"Certainly we may question the consistency of Chief Justice DIXON when, in *Dodge* v. *Hopkins*, he strongly declares for this doc-

trine of mutual obligation and yet, in seeking to avoid the force of the cases to the contrary, he uses this language: 'The inaccuracy consists in not properly distinguishing between those cases where the subsequent act of ratification is put forth as *the foundation of a right in favor* of the party who has ratified, and those where it is made the basis of a demand *against* him.' There is not much mutuality in this distinction.

"In Mr. Mechem's view of the case ratification is impossible. The principal before his ratification is not bound, because the act of the agent was unauthorized. The other party is not bound because the obligation of contracts must be mutual and the principal is not bound. The principal after his ratification and before the ratification of the other party is not bound, because his ratification can not bind the other party, and the other party remains unbound and the obligations of contracts must be mutual. To hold otherwise would be to hold that one party was bound when the other was not. Nor can he be bound from the ratification of the other party until his own second ratification, because 'it can not rest with one party alone to bind the other party also to the contract.' Nor can he be bound at the time of his second ratification, because up to that time he was not bound and the other party, in consequence, could not be, and his act could not bind the other party. And so on *ad infinitum*. * * * The conclusion must be that Wharton is right or that the contract is necessarily and forever a nullity. The latter will be admitted by no one. The former, then, must be true."

On principle, we should say that the doctrine of ratification ought not to be over-refined. In the case at bar, Schwartz, Dupee & Company could have assigned their contract with Jamieson & Company and the assignee could have sued thereon, taking the contract *cum onere*, that is to say, subject to all defenses which could have been made in a suit by the assignor; the practical effect of ratification is therefore the same as an assignment.

Jamieson & Company knew, of course, that Schwartz, Dupee & Company were brokers and in all probability acting for undisclosed principals. They contracted with them and with whomsoever they might represent.

C.—Appellants' Right to Their Agent's Remedies.

If it were true that on the 25th of July, 1896, Schwartz, Dupee & Company, as agents for the appellants, obtained for them a contract for the sale of 700 shares of Diamond Match stock at $229 per share, appellants furnishing seven thousand dollars cash to secure

the same, and, as we have seen, nearly six thousand dollars cash to obtain the same—if it were true that, without authority from the appellants, Schwartz, Dupee & Company bartered, and thereby canceled, this contract for the contract of August 3rd at $222 per share, which they made in their own name and in their own right, still using seven thousand dollars ($7,000) of appellants' money to secure the same, then Schwartz, Dupee & Company would have been guilty of a fraud in law whatever might have been their intention in fact. A contract—a chose in action—is *property*. If an agent converts the property of his principal into other property of a like or unlike kind, taking the title thereto in his own name and to his own use, it is a fraud upon the principal, and the law regards him as a trustee for the principal to the extent of the property so obtained.

The case of *Cook* v. *Tullis*, already cited, is an authority in point:

"Now, it is a rule of equity jurisprudence," says the opinion of Mr. Justice FIELD, page 341, "perfectly well settled and of universal application, that where property held upon any trust to keep or use or invest it in a particular way, is misapplied by the trustee and converted into different property, or is sold and the proceeds are thus invested, the property may be followed wherever it can be traced through its transformations, and will be subject, when found in its new form, to the rights of the original owner or *cestui que trusts*."

The doctrine is thus stated by Mr. Pomeroy in his work on Equity Jurisprudence, Vol. 2, Sec. 1051:

"If an *agent* or bailee wrongfully disposes of his principal's securities, and with the proceeds purchases other securities in his own name, in these and all similar cases equity impresses a constructive trust upon the new form or species of property, not only while it is in the hands of the original wrong-doer, but as long as it can be followed and identified in whosesoever hands it may come, except into those of a *bona fide* purchaser for value and without notice; and the court will enforce the constructive trust for the benefit of the beneficiary owner or original *cestui que trust* who has thus been defrauded."

D.—THE DUTY OF EQUITY TO END LITIGATION.

All parties in interest were before the court. The finding of the referee and of the trial judge is, that on the 3d day of August "there came into existence by the transactions stated a contract, whereby primarily between Schwartz, Dupee & Company and the

defendants (Jamieson & Company), the latter were obliged to purchase of the former and the former were obliged to sell to the latter during the month, 700 shares of this stock at the price of $222 per share."

"Nor can there be any doubt," says the opinion, "that the undisclosed principals of either of these parties were entitled to step into the places of these respective brokers, and in their own name and for their own benefit, insist upon the enforcement of the contract according to its terms."

Did Schwartz, Dupee & Company represent any principals in this transaction or was the contract made on their own behalf? They claim, both in the evidence and in their answer, to have acted on behalf of the appellants. They disclaim any interest in the contract whatever, or in the fourteen thousand dollars deposited to secure it. The testimony further discloses that while it is true Schwartz, Dupee & Company were accountable to appellants under the contract of July 25, 1896, for the sale of 700 shares of Diamond Match stock, at $229 per share, the appellants had received in cash the difference between said number of shares at $229 and $222, *so that Schwartz, Dupee & Company, in any event, would be liable only to them for the precise amount here involved.* Is it possible that under such circumstances, appellees can escape liability, because Schwartz, Dupee & Company, whom they confessedly owe, disclaim all interest in the contract, and on that account refuse to sue, or file a cross-bill?

Had they filed a cross-bill in this case against appellees they would have been entitled to recover; but it goes without saying that where all the parties in interest are before the court and an end to the matter can not be made for insufficiency of pleading, a court of equity may order a cross-bill to be filed, and in one case, at least, a decree was reversed because the court neglected of its own motion to order the filing of a cross-bill, in order that there might be an end to litigation.

See *Sims* v. *Burke*, 109 Ind. 214.

Chamley v. *Lord Dunsany et al.*, 2 Shoales & Lefroy's Rep. 689, was decided by the House of Lords in 1807, on an appeal by Chamley.

The facts in the case were rather complicated, as will appear from a reading of the various opinions; "a case more entangled," said Lord ERSKINE, "than any other I ever had to consider."

For an understanding of the particular point to which we cite the case, the facts may be summarized as follows:

Messrs. Latouche had taken possession of the property of one Warren under a grant *in custodiam* of his estates. The custodian

process, peculiar to Ireland at that time, is thus described by Lord REDESDALE (p. 694), and heartily condemned by him as iniquitously oppressive:

"In order to have a custodian the person who is the creditor proceeds to outlaw the debtor, and then the creditor obtains from the exchequer a grant of the debtor's estate, which is forfeited to the crown by means of the debtor's outlawry. The creditor having obtained the grant *in custodiam*, is put in possession of all the debtor's lands, and all the tenants to the estate are bound to pay their rents to him; and all prior creditors are excluded till such custodee is satisfied."

By a series of fraudulent dealings the appellant, Chamley, who was the attorney for the outlaw, Warren, obtained possession of a portion of the estate with the Messrs. Latouche. The Messrs. Latouche, with the fatuity of scoundrels, brought suit against subsequent mortgagees and judgment creditors of Warren, Lord Dunsany being the particular object of attack, and fraudulently obtained a master's report which would make their holding of Warren's estate practically perpetual. Lord Dunsany commenced a cross-suit. *In both these suits Warren was party defendant, but set up no claim on his own account nor did he ask affirmative relief.* From a decree pronouncing Chamley's claims to the land fraudulent, and his possession and receipt of the rents likewise fraudulent, and requiring him to account to Warren, the proceeds to go to Warren's creditors, Chamley appealed.

He urged six reasons why the decree should be reversed, the fourth and fifth (p. 691) reading as follows:

"4. That if any money was due from the appellant to Warren, the personal representative of Warren is the person to recover it, and not the respondents as creditors.

"5. For that so much of the decree as directed an account between the appellant and the co-defendants, Messrs. Latouche, was not warranted by the practice of the court, being a decree between co-defendants."

On these points Lord REDESDALE, in an opinion both luminous and voluminous, says, p. 708:

"A court of equity must pronounce its decree according to the case made and proved; and if such case and proof show that the property was held fraudulently, or in trust, or both, as in this very peculiar case, the court must so declare, and act upon it accordingly; and instead of such a declaration being objectionable, it appears to me to be the duty of a court to make it, in order to prevent a multiplicity of suits."

And further, p. 709:

"*But it seems strange to object to a decree because it is between co-*

defendants, when it is grounded on evidence between plaintiffs and defendants. It is a jurisdiction long settled, and acted on, and the constant practice of a court of equity; so much so that it is quite unnecessary to state any case in its support."

And Lord ELDON, acquiescing in these views, states, p. 718:

"It is said that a decree is made between defendants, and that such is contrary to the practice of a court of equity, because there can not be a cross-examination between co-defendants. I dwell on this objection because it has been made by the solicitor general, whose arguments are entitled to the very highest respect. Whatever he says must have considerable weight with this house, and with no member of it more than myself, who have had such opportunities of learning the extent of his talents. But, my lords, *where a case is made out between defendants by evidence arising from pleadings and proofs between plaintiffs and defendants, a court of equity is entitled to make a decree between the defendants.* FURTHER, MY LORDS, A COURT OF EQUITY IS BOUND TO DO SO. *The defendant chargeable has a right to do so. The defendant chargeable has a right to insist that he shall not be liable to be made defendant in another suit for the same matter that may then be decided between him and his co-defendant. And the co-defendant may insist that he shall not be obliged to institute another suit, for a matter that may be then adjusted between the defendants.* AND IF A COURT OF EQUITY REFUSED SO TO DECREE, IT WOULD BE GOOD CAUSE OF APPEAL BY EITHER DEFENDANT."

II.

THE QUESTION OF GAMBLING.

Had the respondents in their answer to petitioners' bill of complaint interposed the defense of gambling; had testimony before the master been directed to the issue thus raised, and had the master found as a fact that under the guise of a contract, legal in form, the parties to it had, nevertheless, mutually agreed that the subject-matter of the contract should not be tendered or accepted, but that a settlement should be had according to differences in price; and had the master's finding in this behalf been sustained by the trial court, and affirmed by the Circuit Court of Appeals, the case at bar would present no features of novelty or of unusual interest.

But the respondents in their answer did not seek to impeach the transaction on the ground that it was wagering or gambling; no testimony was introduced before the master remotely touching such an issue; and it was only in response to the innuendoes of counsel in oral argument that the master found affirmatively that

the transaction was not gambling. This finding of the master was, in effect, affirmed by the trial court when his honor, Judge Grosscup, speaking of the contract here sued upon, declared:

"*There can be no question* that there came into existence by the transactions stated a contract, whereby, primarily between Schwartz, Dupee & Company and the defendants, the latter were *obliged* to purchase of the former, and the former were *obliged* to sell to the latter, during the month, seven hundred shares of this stock at the price of $222 per share."

Whether the transaction *on its face* disclosed an intention of the parties *necessarily* unlawful, and rendering the contract between them gambling *per se*—this question, perhaps, was still in the case, and the Court of Appeals, therefore, would, of its own motion, be justified in taking judicial notice of it.

We have seen that a sale for future delivery on the Chicago Stock Exchange must, under the rules of that institution, go through the clearing house. We have seen that the transaction out of which this controversy arose proceeded step by step through the usual and ordinary routine, resulting in the contract of August 3d, upon which this suit was brought. *There is not a circumstance in the transaction out of the ordinary, save only as the methods peculiar to the Chicago Stock Exchange have made it so.* Nevertheless, the Circuit Court of Appeals has declared the transaction to be a gambling transaction. The decision of the Court of Appeals is the most far-reaching on this important subject in the whole body of the law. *Its effect is to make every one, availing himself of the machinery of a stock exchange to effect sales for future delivery, a gambler in spite of himself and regardless of his intentions.*

That a stock exchange offers unusual facilities for *speculation* in shares of corporate stocks may be admitted. But the law does not prohibit speculation, however much individual judges may reprobate it. A man has as much right to exercise his judgment as to the future values of corporate stocks and trade in them accordingly, as the merchant has to order his winter stock of dry goods in the middle of July, or a contractor to agree with the Government to supply beef for the Indians, himself not owning a neat's foot. Sporadic legislation against contracts of sale for future delivery has, on trial, proved more harmful than healthful, and in every instance, so far as we are aware, has been repealed. On the whole, the proneness of human nature to *risk* has made for good rather than evil, and the poet was supposed to have uttered a noble sentiment when he said:

> He either fears his fate too much,
> Or his deserts are small,
> Who dares not put it to the touch,
> To win or lose it all.

In common parlance, the man who agrees to buy shares of ock as an investment, to put away in his strong box to await the evelopment of the enterprise represented by them, is a conserva- ve business man, particularly if, *in the long run*, his judgment is indicated; while the man who agrees to buy or sell hoping to real- e a small profit on the turn of the market—even before he is alled upon to perform, perhaps—is a gambler. The law makes o such invidious distinction. It does not predicate a principle on he mere lapse of time. Both are speculators, neither is a gambler. ndeed, there is more logic than casuistry in the argument which educes all enterprise to speculation and, as it were, to gambling; nd the common law, as we know, upheld wagers. But there is an thical as well as legal distinction between lawful and unlawful peculation—between business and gambling. In case of a wager s to whether a thing will or will not happen, the loser has nothing vhatever to show for his loss; whereas the man who has agreed to uy a thing at a future time at a price greater, as the event shows, han he could then purchase it, obtains the thing contracted for; nd the man who agrees to sell a thing at a future time for less than ie might then obtain in the market, receives the price he bargained or.

As said by AGNEW, J., in *Kirkpatrick* v. *Bonsall*, 72 Pa. St. 158:

"We must not confound gambling, whether it be in corpora- ion stocks or merchandise, with what is commonly termed speculation. Merchants speculate upon the future prices of that in which they deal, and buy and sell accordingly. In other words they think of and weigh, that is, speculate upon, the probabilities of the coming market, and act upon this lookout into the future, in their business transactions; and in this they often exhibit high mental grasp, and great knowledge of business, and of the affairs of the world. Their speculations display talent and forecast, but they act upon their conclusions and buy or sell in a *bona fide* way. Such speculation can not be denounced. * * * *The illegal pur- pose is therefore a fact falling within the province of the jury*, and when found by them, brings the contract under the ban of the law."

And the language of THOMPSON, C. J., in *Smith* v. *Bouvier*, 70 Pa. St. p. 332, is equally to the point:

"*Bona fide* time contracts about stocks and other personal prop- erty seem from custom to be necessary in our country, and although such transaction may be greatly affected by the rise and fall of the market, yet they are not for this reason obnoxious to the objec- tions made to the transactions we are now considering; for in such case the losing party has something for his money, but the losing gambler nothing.

"The doctrine contended for here would place all stock contracts

on the same footing, if making profits may be deduced as the motive of the parties buying and selling. When stocks are bought and sold, to be actually delivered, it is a very different case from that of Brua's appeal, *supra*, where the transaction was found to have been simply a bet or wager. In the one case the transaction is within the scope of a business everywhere recognized as legitimate; in the other it is a gambling transaction, which courts will never exert their power to enforce, if not entirely executed by the parties."

In *Porter* v. *Viets*, Fed. Cas., 11, 291 (Illinois, U. S. Circuit Ct.), Judge DRUMMOND possibly went too far in excluding evidence of a collateral understanding, but his definition of a wagering contract is clear and forcible.

V. sold corn to P. at forty-eight cents, for delivery June 30; when that time came, corn had risen to sixty-three cents; V. refused to deliver. Suit brought for non-delivery. V. set up that at time of making contract (April) he had not the corn to deliver, nor had he entered into any contract to purchase it to fulfill his contract with P.; nor had he any expectation of obtaining corn; that it was not intended by parties that corn should be delivered, but that it was a contract for the payment of the difference between price mentioned and its market value at time of delivery; that it was nothing more than a wager between parties as to price of corn at the time fixed on, and that the contract was only a cover to the real intent of the parties, which was merely a bet, and nothing more.

DRUMMOND, J.: "Whatever doubt may have formerly existed, it must be now considered that the settled law, both in England and in this country, that the mere fact that a man *may not have in his possession, and has not attempted to acquire possession of, a particular commodity, which he undertakes to sell, deliverable at a future time, will not render illegal a contract made by him to sell and deliver the article.* He is bound by his contract, nevertheless, and must deliver the property, or be subject to the consequences of a non-delivery. It is an agreement to sell and deliver at a future day, and to release a party from such a contract, because he did not at the time have the property, would interfere too much with commercial contracts. * * * If corn had fallen fifteen cents a bushel, Viets would have insisted on P. & Co. carrying out *their* contract! Both parties entered into it with full knowledge of the risk they ran, and the court will not help one of them because his judgment was unsound, or because something occurred that he did not foresee. * * * It is not necessary to decide in this case whether a wager between these parties as to the price of corn at a particular time was valid or not. The defendant now insists that he did not make such a contract as is presented to the court by the pleadings, but that it was an agreement to pay the

difference between the price of corn as stated, and the price at a future day; in other words, he wishes to prove what the law determines is ordinarily the measure of damages for the non-performance of his contract. The rule is well settled that when two men make a contract, and reduce it to writing, and sign it, that is the contract between them. It can not be shown verbally that something different was intended at the time from what appears in the writing. * * * Here no fraud is pretended; the contract is free from doubt or ambiguity. It is to deliver a certain quantity of corn at a certain time for a certain price, all set forth in writing. The defendant says that he wishes to show that the intention of the parties at the time was to make a wager as to the price of corn during the last half of June, and that the amount of the wager and the party who was to win or lose was to depend upon the market price of corn. *Now it may be true that the result is precisely the same—that is, the one party loses and the other party gains the same amount as in a wager. So it is in any case of this kind, when a party does not perform his contract.* But that circumstance does not make the CONTRACT the same. In the case of a wager on the *price*, when a man pays the '*difference*,' he performs his *contract*, but he does not fulfill *this* contract by paying the difference. HE MEETS THE PENALTY THE LAW IMPOSES FOR A BREACH OF IT. Here this defendant wishes to establish orally that another contract was made at the time, not in writing, and which he alleges was illegal, in order to make out the illegality of the written contract. This can not be done. No doubt all contracts which are illegal may be attacked, but no case has been shown which authorizes a party to prove verbally, that another contract (in itself illegal) existed, *and so get rid of a written contract on its face unexceptionable.*"

In *Hentz* v. *Jewell*, 20 Fed. Rep. 593, (Miss.) HILL, J., said: "If, according to the contract between the parties when made, EITHER MAY DEMAND A STRICT COMPLIANCE WHEN THE TIME FOR PERFORMANCE COMES. THEN THE CONTRACT IS VALID, EVEN THOUGH ONE OF THE PARTIES MAY SECRETLY INTEND AT THE TIME NOT TO COMPLY, IF SUCH NON-PERFORMANCE IS NOT AGREED TO BY THE OTHER CONTRACTING PARTY AT THE TIME OF CONTRACT. In other words, to render the contract invalid, there must *at the time of its creation*, be a mutual understanding between the parties that no delivery is to be made, but only the difference in prices paid."

The *syllabi* in *Clarke* v. *Foss et al.*, 5 Fed. Cas. No. 2852 (7 Biss. 540), give a categorical statement of the propositions we contend for.

The *syllabi* with their annotations read as follows:

1. A contract for the delivery at a future time of personal property, *which the seller has not on hand when the contract is made, nor any means of getting it*, is not void for illegality.

2. *The secret intention of one of the contracting parties not to fulfill his contract, uncommunicated to the other, is not enough to make the transaction illegal.*

(Approved in *Ward* v. *Vosburgh*, 31 Fed. 14.)

3. The intent that such a transaction should be a mere betting on the market, without any expectation of actual performance *must be mutual and constitute an integral part of the contract in order to render it invalid.*

(Approved in *Ward* v. *Vosburgh*, 31 Fed. 14.)

4. *If the contracts were valid in their inception* and not tainted with any gambling intent or device, *a subsequent mutual settlement by the parties by payment of differences*, instead of by actual delivery, *can not make them void for illegality.*

(Approved and applied in *Gilbert* v. *Gaugar*, Case No. 5412; *Ward* v. *Vosburgh*, 31 Fed. 15, 16; cited in *Third Nat. Bank* v. *Harrison*, 10 Fed. 250; *Jackson* v. *Foote*, 12 Fed. 41; *Hentz* v. *Jewell*, 20 Fed. 593.)

The case of *Clark* v. *Foss et al.*, arose out of contracts made in Illinois and the case was decided according to the law of that State.

One of the leading authorities in the United States is *Sawyer, Wallace & Co.* v. *Taggart*, 77 Ky., p. 727.

The *syllabi* in this case read as follows:

1. CONTRACTS FOR THE SALE OF GOODS TO BE DELIVERED AT A FUTURE DAY ARE NOT INVALIDATED BY THE CIRCUMSTANCE THAT, AT THE TIME OF MAKING THE CONTRACT, THE PURCHASER INTENDS TO RESELL BEFORE THE TIME APPOINTED FOR THE DELIVERY.

2. CONTRACTS FOR FUTURE DELIVERY, ENTERED INTO WITHOUT ANY MUTUAL AGREEMENT, TACIT OR EXPRESS, THAT THEY ARE NOT TO BE PERFORMED BY DELIVERY OF THE GOODS AND PAYMENT OF THE PRICE, ARE VALID, AND NO SUBSEQUENT AGREEMENT TO SETTLE THEM BY THE PAYMENT OF DIFFERENCES CAN RENDER THEM INVALID.

3. THE FACT THAT THE PURCHASER FOR FUTURE DELIVERY INTENDS NOT TO RECEIVE AND PAY FOR THE GOODS, BUT TO RESELL THEM BEFORE THE DATE OF THE DELIVERY, FURNISHES NO GROUND FOR HOLDING THAT IT WAS TACITLY UNDERSTOOD THE CONTRACT WAS NOT TO BE PERFORMED, AND WAS TO BE SETTLED BY THE PAYMENT OF DIFFERENCES.

4. A purchaser of goods for future delivery—through a commission merchant by depositing a margin—who orders a resale before the contract time for delivery, is liable for all losses thereby sustained.

5. A GAMING CONTRACT IS ONE IN WHICH IT IS AGREED OR UN-

DERSTOOD IN THE BEGINNING THAT THE THING DEALT FOR IS NOT INTENDED TO BE DELIVERED, BUT THAT THE PARTIES ARE TO SETTLE THEIR MUTUAL WAGERS ON THE PRICE, BY PAYING THE DIFFERENCE BETWEEN SALES AT DIFFERENT TIMES.

The contract under consideration in the case of *Sawyer, Wallace & Co.* v. *Taggart* was made on the New York Cotton Exchange.

Say the court:

"Sales for future delivery have long been regarded and held to be indispensable in modern commerce, and as long as they continue to be held valid, one who buys for future delivery has as much right to sell as any other person, and there can not, *in the very nature of things, be any valid reason why one who buys for future delivery may not resolve, before making the purchase, that he will resell before the day of delivery*, and especially when, by the rules of trade and the terms of his contract, the person to whom he sells will be bound to receive the goods from the original seller, and pay him the contract price. * * *

"But if A, desiring to engage in trade, enters into a contract with B for the purchase of an article for future delivery and becomes bound to receive and pay for it, that is a real transaction, and is valid whether made in the country or on 'Change. What difference, then, is made in the nature or character of the transaction if, instead of intending to receive the article himself and pay for it, he intends to resell it, and thereby procure another to receive and pay for it in his stead?

"*The material matter is that the contract shall be such that its performance can be enforced. If, in the case put, A does not, by reselling, procure another to perform the contract for him, he is bound to perform it himself.* * * *

"It is next contended that such understanding (to gamble) is shown by the fact that in the whole course of dealing between Sawyer, Wallace & Co., and Hamiltons, extending over a period of about two years, and amounting in the aggregate to several hundred thousand dollars, no goods were ever actually received by either on account of any of said transactions.

"This argument would have much force but for the fact that all these transactions were had with the same intention to resell and the further fact that sales were actually made in all instances, just as in those we are considering. If one such transaction might be legally had, then many made with the same object in view would be equally lawful. * * *

"BUT COUNSEL CONTEND THAT THE RULES OF THE NEW YORK EXCHANGE ARE SO FRAMED AND THE COURSE OF DEALING THERE IS SUCH THAT DELIVERIES CAN NOT BE ENFORCED, AND THAT THIS PROVES OR TENDS TO PROVE THAT THE PARTIES UNDERSTOOD THESE CONTRACTS

WERE NOT TO BE ENFORCED. RULES 4, 6 AND 8 OF THE COTTON EXCHANGE ARE INDICATED AS ESTABLISHING THIS VIEW.

"Rule 4 provides that either party to a contract may close or cancel it upon notice in writing to the opposite party at any time before notice of delivery. But how? The rule goes on to provide that 'the party to whom notice is given has the option either to make settlement (*i. e.*, to pay or receive the difference), or to receive a satisfactory contract made equal to that held by him.'

"Upon such notice being given, the party receiving it *is not compelled* to accept settlement by payment of differences. He has, by the express language of the rule, the 'option' to demand another contract equal to that held by him. The only effect of the rule is, that if the party giving the notice can procure a party satisfactory to him to whom notice has been given to take his place and perform the contract, the contract of such person must be accepted in lieu of the original contract. This is but a reasonable regulation which, while it does not deprive the party receiving the notice of the right to demand the thing purchased, or to deliver and receive payment for the thing sold, may be, and doubtless is, of great practical value and importance to trade, and in no way tends to facilitate fictitious trading or gambling on market prices.

"Practically the rule amounts to this, that the party to whom notice is given must pay, or accept payment of the difference or accept a satisfactory person in the room and stead of the party giving the notice, and discharge him and look to his substitute for performance of the contract.

"Rule 6 relates to margins, and we do not perceive that it has any bearing upon the question in this case.

"Rule 8 relates to settlements when there has been default in delivering or receiving cotton due on a contract. It provides that in such cases the seller making default shall settle at one quarter of a cent per pound above the average quotations for spot cotton of the day of delivery, and that a buyer making default shall settle at the average quotations for spot cotton of the day following, with the addition of one quarter of one cent per pound in favor of the seller; and it also provides that 'no defaulting party can claim settlement under this rule, except upon evidence that the default was unintentional, and not premeditated.'

"Liability for such a penalty for default, and a provision for this summary mode of making settlements in such cases, would seem to be a sufficient and salutary guaranty for the performance of contracts, and instead of affording facilities for, or furnishing evidence of, gambling on the turn of prices, seems well calculated to insure that good faith and promptness so indispensable in commercial transactions.

"Without noticing other provisions of the rules, it may be remarked that they seem to provide for real and not fictitious trade; that they provide against unreal transactions; and that so large a portion of the real business in the great cities is done on 'Change as to wholly forbid the conclusion that all contracts made on them are unlawful; and unless such conclusions could be reached, the contract involved here must be held to have been valid and lawful."

To the same effect is the holding of Judge COOLEY in *Gregory* v. *Wendell*, 40 Mich. 432.

See also, *Hatch* v. *Douglass*, 48 Conn. 116.

The doctrine announced in *Bibb* v. *Allen*, 149 U. S. 481, is in line with the foregoing authorities. The contract involved was also made on the New York Cotton Exchange, the rules and usages of which institution were held to have been incorporated in the contract.

Say the court:

"In entering into their arrangement, it is shown by the correspondence, and by other testimony in the case, that there was no agreement or understanding between the plaintiffs and defendants that the cotton sold for future delivery *was not in fact* to be actually delivered."

After a general statement that an agent can not recover, being *particeps criminis* in an illegal transaction, the court add:

"But the facts of this case do not bring the transactions in question within the operation of that principle, for the evidence set out in the bill of exceptions *fails to show* that either party to the transactions intended the same as wagering or gambling speculations. On the contrary, the undisputed testimony establishes that the sales were not wagers, but that the cotton was to be actually delivered at the time agreed upon. Bibb's own statement of the transactions does not disclose the fact that they were intended, even on his part, as gambling or wagering speculations. He certainly never disclosed to the plaintiffs, as his brokers, either in their correspondence or in their verbal communications, that he did not intend to deliver the cotton sold through them for future delivery. *In addition to this it is shown that the rules and regulations of the New York Cotton Exchange recognized no contracts except for the sale and purchase of cotton to be actually delivered. These rules and regulations impose upon the seller the obligation to deliver the cotton sold, and upon the purchaser the obligation to receive it*, except in certain specified cases, which have no application to the present case.

"It is well settled that contracts for the future delivery of merchandise or tangible property are not void, whether such property is in existence in the hands of the seller, or to be subsequently acquired. 2 Kent's Com. 468, and authorities cited in notes; Ben-

jamin on Sales, Am. Ed., 81, 82. *It is further well settled that the burden of proof is upon the party who seeks to impeach such transactions by showing affirmatively their illegality. Rountree* v. *Smith*, 108 U. S. 269; *Dykers* v. *Townsend*, 24 N. Y. 57; *Irwin* v. *Williar*, 110 U. S. 499, 507, 508. In this latter case (*Irwin* v. *Williar*) the trial court charged the jury that 'the burden of showing that the parties were carrying on a wagering business, and were not engaged in legitimate trade or speculation, rests upon the defendant. On their face these transactions are legal, *and the law does not, in the absence of proof, presume that the parties are gambling.* A person may make a contract for the sale of personal property for future delivery which he has not got. Merchants and traders often do this. A contract for the sale of personal property which the vendor does not own or possess, but expects to obtain by purchase or otherwise, is binding if an actual transfer of property is contemplated. A transaction which on its face is legitimate can not be held void as a wagering contract by showing that one party only so understood, and meant it to be. *The proof must go further, and show that this understanding was mutual; that both parties so understood the transaction.*'" * * *

And the court adds, p 493:

"This court approved that charge as a correct statement of the law upon the subject of what constitutes a wagering contract. It is directly in point here, for the evidence *fails to show* not only that Bibb & Company intended it as a wagering contract, but it *fails to show* also that the plaintiffs so understood it. The testimony establishes that the plaintiffs did not, in fact, so understand it.

"It further appears that in the memorandum, or 'slip contracts' of sale actually made by the plaintiffs for the account of Bibb & Company, the sales were described as made 'subject to the rules and regulations of the New York Cotton Exchange.' Under these circumstances we are of the opinion that the testimony *fails to establish* that the contracts in question were wagering transactions, and therefore void. The testimony is so clear to the contrary that the court below, under the settled rules of this court, was certainly justifiable in not submitting that question to the jury; for if it had been submitted, and the jury found that the contracts were wagers, it would have been the duty of the court to set aside their verdict."

"The rules of the New York Cotton Exchange are not set out in the opinion in *Bibb* v. *Allen*, but if they may be presumed to be the same as set out in the opinion in *Sawyer, Wallace & Company* v. *Taggart, they permit a greater latitude for settlement according to differences than the rules of the Chicago Stock Exchange.*"

A recently hotly contested case through the Illinois courts, growing out of a series of transactions on the Chicago Board of

Trade, determines many questions involved in this case and incidentally touches upon a question of a rule of the board of trade, which, in its operation, is not unlike the clearing house of the stock exchange.

The case is *Warren & Co.* v. *Scanlon,* to be found in 59 Ill. App. 138, 68 Ill. App. 213 and 169 Ill. 142.

The defendant pleaded the statute against options; also gambling. The verdict of the jury on the first trial was in favor of the defendant and plaintiff appealed. The judgment of the lower court was reversed because the facts did not justify the inference of the jury that the intention of the parties was to settle according to differences in price.

In the Appellate Court the appellee urged (59 Ill. App. 141) that no delivery of grain was shown except in the " ringing up " process described in *Irwin* v. *Williar,* 110 U. S. 399, and claimed that no rule of the board of trade could bind appellee to accept such delivery unless he had actual, as opposed to presumptive, knowledge of the existence of such a rule.

Further claiming that the rule itself was illegal and void and that " *if business is transacted under it, the board of trade itself is nothing but a gigantic 'bucket shop.'* "

Judge CARTWRIGHT delivered the opinion of the court but did not pass upon this point.

When the case again came before the Appellate Court on an appeal by the defendant (verdict having gone against him), practically the same points were urged, and Judge LACEY, delivering the opinion of the court, says, 68 Ill. App. 217:

"The first instruction ignores the fact (as is claimed) *that the contracts themselves on the board of trade leave an option open to either party to receive or not to receive, to deliver or not to deliver, the grain.* We do not understand that the proof tended to show any such option with the board of trade.

According to the rules of the board of trade a purchaser of grain could make sale of as much grain as he had purchased, and the member of the board of trade making the sale or purchase would take the burden upon himself to see that the wheat when delivered on the purchase should be immediately turned over on the sale. He simply took this responsibility as the agent of his employer, his employer not being able to deal on the board of trade himself. *We do not think such a rule could be twisted into an optional sale by any fair reasoning. If so, transactions under the rules of the board of trade would be in their nature per se gambling transactions, which we do not understand that any court has ever holden.*"

The judgment of the trial court being approved, the defendant

prosecuted his appeal to the Supreme Court, 169 Ill. 142, Mr. Justice Carter delivering the opinion of the court and re-affirming the judgment.

Of the opinion of the Circuit Court of Appeals in this case (Tr. p. 171) our criticisms are both general and specific.

I.

General Criticisms.

1. It affects to discover from the evidence, combined with the rules of the stock exchange, an *intention* of the parties to gamble. We respectfully insist that the *intention* of the parties in transactions of this kind *is a question of fact*, to be pleaded as a fact, and so found by a jury, or a master, or the trial court.

Bartlett v. *Smith*, 13 F. R. 263.

In an article in the Central Law Journal by Mr. Elliott, of Indianapolis (Vol. 22, p. 271), it is said:

"Intent and motive are two different things, the motive being that which causes or induces the act, and the intent being the purpose for which it is done; but the two words are often used interchangeably in the authorities, and the distinction, while proper, is not always a necessary one. * * * Intention or motive being a state of mind internal and invisible except through outward manifestations, its existence must usually be a matter of inference or presumption from the outward or visible acts and manifestations, which serve to indicate more or less clearly and conclusively the particular intention. * * * Formerly, therefore, when parties were not competent witnesses, the usual, and in general, the only way of proving intent was by evidence of such conduct, or such outward acts and circumstances as tended directly, or indirectly, to show the particular intent. But where parties are allowed to testify, it is now generally held that the intention is, in a sense, a fact to be proved as any other fact, and that, when material, a party may testify as to his own intention. This seems in accordance with common sense, for no one can tell better what an act was intended to accomplish, or what motive prompted it than the person who did the act. * * *

The inference to be drawn from the acts and circumstances is usually one of fact for the jury to determine; but there are some instances where, as experience has shown, there can be but one

reasonable inference, which *of necessity* arises from the facts as they stand otherwise unexplained. *In such cases the law itself fixes and determines the inference, which is called a presumption of law.*"

The learned author then proceeds to give instances of legal presumption, as follows:

"Thus, from the uttering of a forged document, the law presumes an intent to defraud the person who would naturally be affected thereby. So where one sets fire to a building, the presumption is that he intended to destroy it, and also that he intended to injure the owner. So, also, where a baker delivers adulterated bread to a public asylum, the presumption is that he intended it to be eaten. And again, when one man kills another by the voluntary use of a deadly weapon, the law presumes that the killing was intended. In such cases it may be said, *res ipsa in se dolum habet*—the acts are evil and show a wrong intention in themselves. *But in most cases the intention is not so clearly or conclusively shown that the law itself can draw the inference*, and it is necessary to prove acts and circumstances from which the court or jury may draw the inference as a fact. As said in a recent case (citing *Burke* v. *State*, 71 Ala. 377), '*intention is an inferential fact to be drawn by the jury from proven attendant facts and circumstances.*'"

Says Mr. Wharton, in his work on Evidence, Vol. 1, Sec. 508:

"A witness, also, is not to be permitted to testify as to the motives by which another person is or has been actuated. Motives are eminently inferences from conduct. The facts from which the inferences are to be drawn are to be detailed by the witnesses; *for the jury the work of inference is to be reserved.* Yet where a party is examined as to his own conduct, he may be asked as to his motive, his testimony to such motive being based, *not on inference*, BUT ON CONSCIOUSNESS."

(That direct testimony of intention in this class of cases outweighs mere inference, see *In re Taylor Estate*, 43 Atl. R. 973.)

The Court of Appeals, notwithstanding no allegation in the pleadings challenged the issue, notwithstanding the parties to the transaction were not interrogated directly as to their intent and motive, notwithstanding their consciences were not "probed" under the sanction of an oath, notwithstanding that *from the very nature of the pleadings* no such inquisition could be had, notwithstanding the direct finding of the master (made, not in response to the pleadings or proofs, but to the argument of defendants' counsel), that there was no evidence from which *he* could infer an intention to gamble, notwithstanding that this finding of the master was practically affirmed by the trial court—we say, notwithstanding all this, the Circuit Court of Appeals, usurping the functions of the master or a jury, *inferred from collateral circumstances that there was a mutual*

understanding and intention from the beginning to gamble, AND GAVE THIS INFERENCE OF FACT THE SOLEMNITY OF A PRESUMPTION OF LAW.

We respectfully insist that having only appellate jurisdiction, the Circuit Court of Appeals was bound by the findings of the master, concurred in by the trial court, unless some obvious *error* intervened in the application of the *law*, or some serious or important *mistake* in a consideration of the *evidence* had been made; and we cite in support of this postulate:

Crawford v. *Neal*, 144 U. S. 585.
Furrer v. *Ferris*, 145 Id. 132.
Telighman v. *Proctor*, 125 Id. 136.
Kimberly v. *Arms*, 129 Id. 512.

2. Concurring in the language of the opinion that equity looks to the intent rather than the form, and that one who seeks relief must come open-handed, with clean hands, and that a court of equity has the right, and is charged with the duty, to probe the conscience of any litigant, we respectfully insist that to "probe" a conscience *involves an inquiry concerning it;* in the absence of which inquiry the Circuit Court of Appeals was without precedent or authority to ascribe of their own motion an unlawful intent to a party litigant *arising out of circumstances and facts equally consonant with a lawful intent.*

The opinion of the Circuit Court of Appeals seems to us to *assume* an unlawful intention on the part of every one connected with the transaction in all its phases, and to vindicate the assumption by reference to portions of the evidence and rules of the exchange which would not indicate an intention to the contrary; whereas we respectfully insist that the court *should start with the presumptions that the parties did not intend an unlawful act and did not intend to gamble, and that the machinery of the Stock Exchange Clearing House was, like the machinery of every other clearing house, devised and inaugurated for the sole and only purpose of facilitating the transaction of lawful business; which presumptions we insist would have led the honorable court to a very different conclusion.*

3. We have carefully studied all the cases cited by the Circuit Court of Appeals in support of its conclusions and unhesitatingly affirm that not one of the cases cited militates against the doctrine of the cases from which we have been quoting, and that *not one of said cases is applicable to the case at bar.* Except the cases cited in the opinion as to the Illinois statute prohibiting optional contracts—which subject will be presently considered—it may be observed of them:

First. *In every case the defense of gambling was specially pleaded,* alleging a mutual understanding and agreement between the par-

ties to settle according to differences in prices, without delivering the subject-matter of the contract.

Second. That where this issue of fact was thus presented by the pleadings, an assertion on the one side and a denial of gambling on the other, the courts *in every instance* submitted the question to the jury *as a question of fact to be determined by a probing of the consciences of the parties under oath as to their real intention and understanding, and the adduction of testimony as to every conceivable fact from which an intention could be inferred.*

Third. That in several cases the Supreme Court simply affirms the verdict of a jury or the findings of the lower court *without giving any intimation as to the particular facts elicited upon the trial.* Such are the cases of:

Pickering v. *Cease*, 79 Ill. 328.
Lyon v. *Culbertson*, 83 Ill. 33.
Pearce v. *Foote*, 113 Ill. 228.
Cothran v. *Ellis*, 125 Ill. 496.

Concerning these cases Judge GARY, in *Postal Tel. Co.* v. *Lathrop*, 33 Ill. App. 402, states as follows:

"In the cases in this State, *Pickering* v. *Cease*, 79 Ill. 328; *Lyon* v. *Culbertson*, 83 Ill. 33; *Pearce* v. *Foote*, 113 Ill. 228; *Cothran* v. *Ellis*, 125 Ill. 496, and perhaps some others, the Supreme Court have not settled the facts upon which they animadverted, as they appear in this record."

These cases, of course, can throw no light on the case at bar further than the announcement of the general principle that contracts for future sale in which, according to the understanding and intention of the parties, the goods contracted for are not to be delivered but a settlement is to be made according to differences in price, are gambling contracts, and that gambling contracts are void.

Fourth. That in all other cases cited in the opinion of the Court of Appeals the intention of the parties was found *as a fact:*

1. By the sworn, direct testimony of one of the parties.
2. Corroborated by circumstances.

Fifth. IN EVERY INSTANCE THE INFERENCE DRAWN FROM SUCH CIRCUMSTANCES IS DUE TO THE INCONGRUITY OR INCONSISTENCY BETWEEN THE FACTS PROVEN AND THE INTENTION CLAIMED. They show, for instance:

1. A *series* of transactions between the same parties covering a period of several months, involving *a large number of sales and purchases, all for future delivery, in which not a single commodity was delivered or tendered.*

2. That the aggregate number of such sales and purchases would foot up an enormous quantity of grain or pork or other

commodities, aggregating in value hundreds of thousands, and in one instance cited, millions of dollars.

3. That the parties purporting to purchase or sell such commodities *could have no possible use for them*, inasmuch as they were in *entirely different employment*, being merely *mechanics, doctors, lawyers*, or, if grain dealers, engaged in the actual manufacture of meal and flour, *with a very small capital.*

Sixth. *That the financial status of these parties would not, within the range of sanity, warrant them in actually buying or selling such quantities and in such amounts.*

Seventh. That in every instance where a particular transaction was pronounced by the court to be gambling it was due to a most reasonable inference, *from just such facts as we have enumerated*, UNDER PLEADINGS RAISING THE ISSUE AS A QUESTION OF FACT.

Eighth. That where the facts developed were not so palpably inconsistent with an actual intention to receive or deliver, the juries and the courts have found the transaction to be valid and binding, and in one instance, at least (*Cothran* v. *Ellis*, 125 Ill. 496), the Supreme Court was constrained to affirm a finding in favor of the plaintiff, notwithstanding testimony from which the jury would have been amply justified in finding for the defendant.

And in *Bibb* v. *Allen*, 149 U. S. 481, the Supreme Court of the United States not only justified the lower court in instructing in favor of the plaintiff where the facts were infinitely more dubious than the facts in this case, but went further and declared that if there had been a finding in favor of the defendant the judgment would have been reversed.

Ninth. The authorities all show that the line of demarkation between legitimate speculations, which the law upholds, and gambling in prices, which the law condemns, *depends wholly and altogether upon the mutual intention and understanding of the parties existing from the beginning*—a most difficult question of fact, which must be affirmatively pleaded by the defendant, who thereupon assumes the burden of proof.

In not one of the cases cited in the opinion of the Circuit Court of Appeals has any court assumed or imputed an intention which all the parties to a transaction have disclaimed.

Specific Criticisms.

1. While the point is not pertinent to the particular question under discussion, we can not refrain from pointing out that the very first proposition laid down by the honorable court does not go far enough. The opening words are as follows:

"Except for the fund or deposit alleged to constitute security

for performance of the contract in question, a remedy for a breach rests at law, and equitable jurisdiction depends upon the existence of such fund to be administered or charged."

We respectfully submit that petitioners' standing in a court of equity does not depend alone upon the administration of a trust fund. The contract of August 3rd sued upon was for the sale of 1150 shares of the stock of the Diamond Match Company, in which contract, however, the petitioners were interested only to the extent of 700 shares.

If petitioners had attempted to spilt up that contract, Jamieson & Company could have objected that they were being subjected to several suits, whereas their liability ought to be determined in a single action.

See *Phillips* v. *Edsall*, 127 Ill. 535.

Furthermore, the contract was between Schwartz, Dupee & Company and Jamieson & Company, and the trust fund was deposited by them. The undertaking of the stock exchange was with the above named parties. The doctrine that an undisclosed principal is bound by the acts of his agent would hardly apply to the stock exchange, which was acting, not as an agent of either party, but as a trustee for both.

See *National Bank* v. *Insurance Company*, 104 U. S. 54.

2. In searching the record for evidence of an intention to gamble, the opinion quotes from the principal brief of petitioners' counsel the language in which they attempted to formulate the terms of the contract of employment between complainants and their agents, Schwartz, Dupee & Company.

It is to be noted in the first place that this does not involve *any conduct of the parties or course of dealing between them, and could not, therefore, be a fact or circumstance from which an inference of intention could be evolved.* More particularly is it to be noted that it was simply an attempt *on the part of counsel* to formulate in words what any authority to deal on the stock exchange, in pursuance of its customs and regulations, must include; in other words, it was an attempt to explain the *rationale* of the daily novations and substitutions made in pursuance of the rules.

Our language was, perhaps, not as clear as it should have been. We have attempted in this application a similar explanation but in different language. We have shown, we hope, that these daily novations and substitutions do not involve any element of risk, can not by any possibility result in loss or gain, injury or advantage to the person consenting to them, do not absolve the parties from their obligation to deliver or receive the number of shares

contracted for at the time specified, do not transmute a contract for absolute sale into an option or privilege contract, do not, in short, afford any motive or inducement, so far as individual interest is concerned, to *consent* to such mutations and novations, and that *the only possible object is to accommodate the stock exchange as an institution, and to make easy its bookkeeping and the transaction of its business.*

How the mere clicking of this machinery, not even heard by the client, can convert a primarily lawful transaction into an unlawful transaction, we are utterly unable to understand; for it is nothing to the client, does not affect him one way or the other, adds nothing to and detracts nothing from his original obligation, contains no element of risk, affords no motive, therefore, for him to gamble.

See *Scanlan* v. *Warren*, 59 Ill. App. 138; same case, 68 Id. 213; same case, 169 Ill. 142.

Third. The opinion refers to the correspondence between the petitioners and their brokers where the former make inquiries concerning the "difference" demanded to change to August account, and the change is then ordered and reported as made by allowing the "difference."

These messages were sent on the 25th day of July. It will be observed that the first message was a direct order to change to August account at 2½, with the added phrase: "If you can not do it, let us know at once."

The next message, sent the same day, states:

"You sent us the difference this morning at 2½. At what difference can you do it now?"

On July 27th the petitioners ordered their brokers, as follows:

"Change 200 more Diamond Match at two per cent or better."

And on the same day the brokers wired petitioners as follows:

"We changed the 200 match at 2¼ difference. Will give you PRICE later."

Now what does this mean?

Every broker in the world knows that it does not have the meaning which the opinion of the Circuit Court of Appeals would bestow upon it. Indeed, the very language of the telegrams militates against the inference the Circuit Court of Appeals would make.

These telegrams show:

1. That instead of being compelled, according to the terms of their contract, to deliver the stock on the 31st of July, the petitioners wished to have the time extended to the 31st of August.

What inference would a jury make from this request? If the petitioners recognized no obligation to deliver on the 31st of July

why should they manifest any desire to have the time extended to August 31st? If they knew the purchaser was not required to accept, why should they expect compensation for extending the day of delivery?

2. The telegrams not only indicate a willingness on the part of petitioners to postpone the day of delivery, but they manifest a desire on their part to receive compensation for the accommodation. What inference would a jury draw from this? Why expect pay for an accommodation if there was no obligation?

3. The telegrams even indicate the price that petitioners were willing to receive for the accommodation, and the word "difference," used by the petitioners, is simply synonymous with the word "price." They might just as well have inquired on what terms, or at what price could the accommodation be obtained; but they express themselves in terms of percentages. Even their telegram, "Change the five hundred at two cents or better," meant two per cent or better.

It was in reference solely to the cost or price of the accommodation which they were willing to extend that the word "difference" was used. Is not this obvious from the telegrams?

4. If the privilege of postponing acceptance to August 31 had not been granted by the petitioners, or if the price offered for the accommodation on their part had been less than petitioners were willing to accept, what, presumably, would have been the result? Clearly, the petitioners would have been obliged to make delivery on the 31st of July, and the purchasers, whoever they might be, would be obliged to accept the shares tendered or take the consequences of their breach of contract.

5. But if petitioners had instructed their agents to close out the deal absolutely, and settle according to "difference in price," this would afford very slight inference that the original intention of the petitioners, to say nothing of the intention of the first purchaser or the ultimate purchaser, or any intermediate purchaser, was to gamble, and no inference whatever that the original understanding and agreement was to settle in differences.

A thousand and one contingencies can be surmised that would make this the wise and proper course to pursue.

6. The fact remains, however, that the contract was not settled by the payment of differences, but that the time of delivery was extended to the 31st of August, and that the petitioners received a consideration for the accommodation.

Fourth. The opinion further states that there is neither averment nor pretense that the petitioners had or controlled any shares of the stock, or procured, or intended to procure, the same for delivery.

What rule of pleading makes proper, much less requires the

allegation in a bill that at the time of entering into a contract for sale petitioner was the owner of the subject-matter of the contract, or had means of procuring the same, or intended to procure the same? Is not this transposing the onus of proof?

According to the Circuit Court of Appeals' implication the demurrer to petitioners' bill should have been sustained for lack of these allegations; but if the law starts out with the presumption that the contract was lawful it must, of necessity, include the presumption that the petitioners either had the stock, or could procure it, or intended to procure it, for delivery. Can an inference of unlawful intention arise from the absence of testimony showing affirmatively a lawful intent?

Fifth. The opinion further states that "it is conceded that they (petitioners) had no stock at any time in the hands of their brokers, and no property in the stock of which pretended tender and sale was made after the alleged default."

First protesting that no inference of unlawful intent is warranted from this alleged fact, and further protesting that the testimony does not show but that the petitioners had the shares of stock in New York, we make bold to assert that the statement does not conform absolutely to the testimony. That petitioners' brokers had the stock ready to be delivered at any time, is a reasonable inference from the fact that it was furnished on the day of delivery; that this stock was at the command and disposal of the petitioners is also reasonably inferable from the fact that it was tendered in their behalf to the defendants, Jamieson & Company, and by the all-important fact that when tender was made the title to the stock vested then and there, *eo instanti*, in the defendants, Jamieson & Co. *Thenceforth it was their stock*, to be held by the petitioners or their brokers, subject to defendants' orders on complying with their contract, or to be sold by petitioners or their brokers as *quasi* agents of the defendants, and the proceeds applied on account.

This vesting of title on tender is because, in Illinois, the 17th section of the Statute of Frauds is not in force. See

Rhea v. *Riner*, 21 Ill. 256.
Wade v. *Moffett et al.*, 21 Ill. 110.
Seckel v. *Scott*, 66 Ill. 106.
Borrow v. *Window*, 71 Ill. 214.
Owens v. *Weedman*, 82 Ill. 409.

Sixth. The opinion refers to the rule of the stock exchange making distinct provision for closing contracts by paying the difference in market price, and further states that the contract in question was made with reference to such rule and by parties unquestionably acquainted with it, and from this rule itself the Circuit Court of Appeals infer an understanding of the parties that only a settlement of differences in price was contemplated.

We submit that the rules of the stock exchange should be con-

strued together, and, if possible, they should be construed as contemplating the transaction of lawful business.

Art. 15, Sec. 1, provides: "Any member who fails to comply with his contracts, or becomes insolvent, shall be suspended until he has settled with his creditors, etc."

Article 17, Sec. 1, provides as follows:

"No fictitious sales shall be made. Any member contravening this section shall, upon conviction, be suspended by the governing committee."

Section 2 provides:

"Any member who shall make fictitious or trifling bids shall, upon conviction, be subject to suspension, or such other penalty as the governing committee shall impose."

Article XVIII provides:

"In all deliveries of stocks, bonds, etc., the party delivering shall have the right to require the purchase money to be paid at the time and place of delivery."

Article XXIX provides:

"Any member of this exchange who is interested in, or associated with, or whose office is connected directly or indirectly by wire or other method or contrivance, with any organization, firm or individual engaged in the business of dealing in differences or quotations on the fluctuations in the market price of any commodity or security, without a *bona fide* purchase or sale of said commodity or security, in a regular market or exchange, shall, on conviction thereof, be deemed to have committed an act or acts detrimental to the interest and welfare of the Exchange."

Article 4 of the By-laws provides:

"No sale of securities shall be made on which a deposit shall be offered as the limit of liability." * * *

Article 7, Sec. 1, provides:

"All deliveries of securities must be made between 11 A. M. and 1:30 o'clock P. M., or the buyer may demand that they shall lie over until the next day without interest, when they shall be delivered before 10:30 o'clock A. M., and when deliveries are not made by that time the contract may be closed under the rule after due notice to the defaulting party as provided in Art. XVII of the by-laws. * * *

In the absence of any notice or agreement, the contract shall continue without interest until the following day, when the same rule shall apply. In every case of non-delivery, however, the party in default shall be liable, in addition, for the damages that may accrue."

Article XVII provides:

"Should any member neglect to fulfill his contract on the day

it becomes due, the party or parties contracting with him shall, after giving notice as required by Sec. 2 of the preceding article, employ an officer of the board to close the same forthwith in the exchange by purchase or sale, as the case may require, unless the price of settlement has been agreed upon by the contracting parties. In case of a failure of a creditor to close the contract as above, the price shall be fixed by the price current at the time such contract ought to have been closed under the rule. In all cases where an officer may be directed to buy or sell securities under this rule, the name of the member defaulting, as well as that of the member giving the order shall be announced. No order for the purchase or sale of securities under this rule shall be executed unless made out in writing over the signature of the party giving the order, who shall state the reason therefor; and it shall be the duty of the officer who executes the order to indorse thereon the name of the purchaser or seller, the price, and the hour at which the contract is closed, and hand the same to the secretary of the board, who shall within twenty-four hours, ascertain whether the party for whose account the order was given has paid the difference, if any, arising from the transaction; if not, the secretary shall report the default to the president. The duty devolved upon the officers of the exchange under this rule shall be performed without charge. No party shall be permitted to supply offers to buy or sell securities closed for his account under the rule; and when a contract is closed under this rule any action of the defaulter, direct or indirect, by which the prompt fulfillment of such contract is delayed, hindered or evaded, to the detriment of the other contracting party, shall subject the offending party to suspension for not less than thirty days, in the discretion of the governing committee, by a vote of two-thirds of the members present at the meeting. When contracts are closed out under the rule, any member supplying the bid or offer, and not duly receiving or delivering the stock, as the case may be, renders himself liable to prosecution under this article. Should any stock thus sold not be delivered until the next day, the contract shall continue, but the defaulting party shall be liable to pay such damage as may be assessed by the arbitration committee," etc.

Under CLEARING HOUSE RULES, Sec. 2 (Tr. p. 141) provides:

"Deliveries of cash stock or transactions for 'the account' shall be made on the last day of each month. Provided, however, should the last day of any month occur on a holiday or on a day when the exchange is closed for business, then in that case deliveries shall be made on the first day *preceding*."

Sec. 6 (Tr. 142) provides:

"Stock balances, as shown by the statements, rendered for cash

settling days, must be delivered and paid for at the closing bid price of the previous day, as per manager's notices, before 1:30 P. M. Provided, however, if satisfactory evidence is shown the clearing house committee that the cash stock is on hand in New York, or in transit for Chicago, three days' grace will be given the seller to make the delivery with interest, failing in which the clearing house committee shall cause to be purchased for account of delinquent, said stock, in whichever market in their judgment seems best; and the party so failing to deliver shall be held responsible for all loss or damage arising therefrom; but when a failure to receive or deliver occurs, nothing in these notifications shall be construed to relieve the last contracting parties to the transaction from the liabilities to each other."

Section 8 provides:

"Whenever a member is unable to meet his contracts or transactions made for "the account," he shall make a statement of his transactions, to be audited that day, and deliver it to the manager or presiding officer of the exchange."

Section 10 provides:

"The same rule as to notice, time and place, that govern defaults in other contracts shall apply to transactions for "the account."

The inference made by the Circuit Court of Appeals from the rule quoted by them would reduce the foregoing rules prohibiting fictitious sales, and denouncing penalties for their violation, to a mere *brutum fulmen*. The opinion of the Court of Appeals practically finds as a fact that the rules of the stock exchange *contemplate only* gambling transactions and *require* parties to settle by payment of differences; *for, if the rule in question, while affording facilities for gambling, gives equal facilities to those lawfully inclined to prosecute their bargains to a lawful conclusion, no inference of gambling ought to be drawn from the rule itself.* THE RULE WOULD AFFORD NO BASIS FOR INFERENCE OF INTENTION ONE WAY OR THE OTHER.

But we respectfully insist that the honorable court misapprehended the meaning and purpose of the rule. *It purports to provide a remedy* FOR THE BREACH OF CONTRACT *by any member of the exchange and fixes a penalty for such breach.*

In this respect it differs in no wise from a great many important contracts entered into between individuals. It is a most just rule. The measure of damages which it prescribes for breach of contract is precisely the measure of damages which the law itself would prescribe.

The members of the stock exchange could not assume that every contract made upon its floors would be faithfully observed. They were, on the contrary, bound to assume that contracts would

be broken, *and if they assumed this they had a right, for the internal harmony and autonomy of their institution, to prescribe what, according to their sense of justice, should be the penalty or measure of damages, and in determining what this measure should be they copied from the law.*

To infer, *as a matter of fact,* an original understanding and agreement of the parties to settle their contracts by the payment of differences in price, simply because the rules prescribe that upon breach of contract the party breaking the contract shall pay certain damages (and these damages precisely the same as the law would inflict) *is, we submit, to infer an unlawful intention from a lawful act.*

The rule which the honorable court evidently had in mind is article 17 of the by-laws. It starts out by saying:

"*Should* any member neglect to fulfill his contract *on the day it becomes due,*" etc. Would it not be inferred from this language that the member was ordinarily *expected* to fulfill his contract?

The rule further says: "Should any stock thus sold *not be delivered until the next day* the contract shall continue, but the defaulting party shall be liable to pay such damages as may be assessed by the arbitration committee."

Why talk about the delivery of stock if no delivery of stock is contemplated by the rule?—if they are dealing in figments or abstract numbers?

But, as already observed, these rules are only intended for the discipline of the members, who alone are permitted to deal upon the floor of the exchange, but who, in nearly every instance, are dealing not for themselves, but for others.

Seventh. The language of the opinion shows a misapprehension of the word "option," and of the purposes of the Illinois statute, declaring that:

"Whoever contracts to have or give to himself or another *the option to sell or buy* at a future time any grain or other commodity, etc., * * * shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year or both; and all contracts made *in violation of this section* shall be considered gambling contracts, and shall be void." (1 Starr & Curtis An. Stat. 2d Ed. pp. 1,293, 1,298, Sec. 130.)

Now, we take it that no contract which *on its face* purports to be a contract for the sale of a commodity to be delivered at a future time *certain* has ever been called an option contract. The statute was aimed at "puts" and calls."

See *Pixley* v. *Boynton*, 79 Ill. 351, which also defines these terms as follows: "A 'put' is a *privilege* to deliver or not deliver grain or other commodity; a 'call' is a *privilege* to call or decline to call for such delivery."

It must be obvious that the "privilege" here spoken of is not

the mere privilege *to break a contract*, for that "privilege" inheres in every contract—with certain legal penalties for the exercise of it; but the privilege meant is the privilege to deliver or not to deliver, to receive or not to receive, *without a breach of contract;* in other words, THE "PRIVILEGE" IS THE VERY THING CONTRACTED FOR.

That such a contract would be valid at common law goes without saying. A contract to gamble in differences of price, however, would now-a-days require no statute to render it void. Therefore the language quoted in the opinion from *Schneider* v. *Turner*, 130 Ill. 28, to the effect that something more was intended by the legislature than the prohibition of gambling is eminently correct.

As already observed, the Legislature had in mind the option contracts known as "puts" and "calls," but the effect of the statute has been more far reaching, perhaps, than the Legislature contemplated.

For instance, if a manufacturer, expecting a large order for goods, should go to a coal merchant and make known that in a certain contingency he would want a large amount of coal, but in another contingency he would not need any, and should enter into a contract with the coal merchant, for a consideration in hand paid, to take a certain amount of coal at a particular date *or not, as he might elect*, the common law would sustain the contract, for the motive which inspired it would be worthy and the consideration paid for the option presumably adequate. But just such a contract has been pronounced void under the Illinois statute.

See *Corcoran* v. *Lehigh & Franklin Coal Co.*, 138 Ill. 390.

If a clothier, for a consideration in hand, should agree to deliver a suit of clothes to a customer on or before Monday next, would it be pretended that such a contract is obnoxious to the Illinois statute against options? Or if, at the time appointed for delivery, the merchant should wait upon his customer and desire an extension of the time till the following Monday, agreeing in consideration of such extension, to a reduction in the price, would it be contended that such a contract was obnoxious to the Illinois statutes against dealing in options?

Says Chief Justice SCOTT, in *Pixley* v. *Boynton, supra*, of a contract for delivery "on or before" the last day of July:

"Under such a contract, as we understand the evidence, all the option the seller has is the privilege to deliver the grain at any time before the maturity of the contract. This is nothing more than a time contract, which is regarded on the board of trade and elsewhere as a legitimate and regular contract. Time contracts in relation to grain, as well as other commodities, are of daily occurrence, and must necessarily be in commercial transactions. * * * The

contract between the parties to this transaction was not an optional one, in the sense of 'puts and calls.' The only option the seller had was as to the time of the delivery. The legal effect of his agreement was that he should deliver the grain contracted to be sold within a limited period."

In the case at bar there was not even an option as to time of delivery. The stock was not required to be accepted before the August account day, which was the last day of the month.

The case of *Schneider* v. *Turner*, 130 Ill. 28, was clearly an option contract. The written contract was as follows:

"Chicago, November 11, 1885.

In consideration of one dollar ($1.00) and other valuable considerations, receipt of which is hereby acknowledged, I hereby agree to sell to George Schneider, Walter L. Peck and Ferd W. Peck, seventeen hundred and eighty-six (1786) shares of the capital stock of the North Chicago City Railway, at six hundred dollars ($600) per share, *if* taken on or before the 15th day of December, 1885.

(Signed) V. C. TURNER."

No where in this contract is there a promise on the part of Schneider et al. to take the shares at any time. If they exercised the privilege before the 15th day of December, 1885, the seller undertook and agreed to deliver a certain number of shares at a certain price. But that it gave Schneider *et al.* an option *to buy or not, as they might elect*, seems too plain for discussion.

It was contended by the appellant that the contract was an executory contract of sale and on the part of the appellee that it created a mere option. The court say, p. 36:

"Looking at the instrument itself, it seems impossible to give it the construction contended for by appellants, without violating plain and well-settled rules of law applicable to all instruments in writing. * * * The construction contended for ignores the first clause of the instrument entirely, and gives to the word 'if' in the last sentence, an entirely different meaning from that ordinarily attached to it, thus making the contract in effect read, 'I hereby agree to sell to George Schneider, Walter L. Peck and Ferdinand W. Peck 1786 shares of the capital stock of the North Chicago City Railway stock, at $600 per share, to be taken (or they to take the same) on or before the 15th of December, 1885.' *So read, it would undoubtedly under the authorities cited, be an absolute contract of sale of the shares of stock.* * * *

The plain, unambiguous meaning of the contract (treating it as such) is, that appellants paid appellee a valuable consideration for the refusal or privilege to buy 1,786 shares of stock of the North Chicago City Railway Company at $600 per share, at any time on

or before the 15th of December, 1885—a contract heretofore of frequent occurrence in commercial transactions, perfectly legal and enforceable at common law. In the absence of section 130, no one, it seems to us, would hesitate to pronounce this a contract to give to appellants the option to buy railroad stock at a future time."

This identical section of the Illinois statute was passed upon by this court in *White* v. *Barber*, 123 U. S. 392. The syllabus of this case reads as follows:

"A *bona fide* contract for the actual sale of grain, deliverable within a specified future month, the only option in which is an option in the seller to deliver it at any time within such month, is not a gambling contract, within the meaning of Sec. 130 of Chap. 38 of the Revised Statutes of Illinois. (Hurd's Ed. of 1883, p. 394; do. of 1885, p. 405.)

"W claimed to recover from B, by a suit in equity, money which he had put into the hands of B, as a broker, to be used by him in transactions which W alleged were wagering contracts, because they were sales of wheat in regard to which both W and B did not intend there should be any delivery of the wheat: Held, that what W did in connection with the transactions was inconsistent with such claim; that B had no such understanding; that the sales of wheat were lawful; and that W was not entitled to recover the money which B had paid out.

"B having paid out the money in settlement of the sales according to the rules of the board of trade of Chicago, was not a "winner" of the money from W, within the meaning of Sec. 132 of Chap. 38 of the Revised Statutes of Illinois. (Hurd's Ed. of 1883, p. 394; do. of 1885, p. 405.)"

STARTING WITH THE PRESUMPTIONS THAT THE PARTIES WERE INNOCENT OF AN UNLAWFUL INTENTION, AND THAT THE MACHINERY OF THE STOCK EXCHANGE CLEARING HOUSE WAS DEVISED FOR THE PURPOSE OF FACILITATING LAWFUL EXCHANGES; AT WHAT STAGE OF THE TRANSACTION DID IT BECOME EVIDENT THAT THE PARTIES INTENDED TO GAMBLE, AND WHEN AND WHEREIN DOES IT APPEAR THAT THE MACHINERY OF THE CLEARING HOUSE WAS INADEQUATE TO CONSUMMATE A LAWFUL CONTRACT IN LEGAL AND PRACTICAL EFFECT AS CONTEMPLATED BY THE PARTIES, AND AT WHAT STAGE OF THE PROCEEDINGS WAS THE CONTRACT OF SALE AND PURCHASE ABSOLUTE CONVERTED INTO AN OPTIONAL CONTRACT TO SELL OR NOT TO SELL AT THE ELECTION OF THE PARTIES?

A brief analysis of the transactions from July 16 and July 20, 1896, to August 3, 1896, will show that the intention of the parties was throughout lawful and the contract of sale absolute.

First. In entering into the contract of August 3, 1896 (the contract here sued upon), is there any proof in the record that

either Schwartz, Dupee & Company or Jamieson & Company intended to gamble?

1. There is nothing on the face of the contract to indicate such an intention.

2. Neither party to the contract has testified in the case that such was his intention.

3. No such claim has been made even in the pleadings.

4. Such an intention would overthrow the legal presumption of innocence and ought not, therefore, to be indulged in the absence of testimony.

5. Being both members of the stock exchange, Schwartz, Dupee & Company and Jamieson & Company would be presumed to have contracted with reference to its rules, and an intention to gamble would contravene the rules and make the offenders liable to expulsion.

6. Furthermore, Jamieson & Company and Schwartz, Dupee & Company *were not contracting on their own behalf;* they were each representing undisclosed principals. In making themselves liable for such undisclosed principals, they had presumably taken the precaution to protect themselves against loss by requiring ample security. IF IT WAS THE *bona fide* INTENTION OF THEIR PRINCIPALS TO BUY AND SELL, THERE COULD NOT BE, IN THE NATURE OF THINGS, AN INTENTION ON THE PART OF THE AGENTS TO GAMBLE.

7. And even if their principals intended to gamble, it would not follow that their brokers, making themselves individually liable on their principals account, would share such intention; for it would not only contravene the rules of their organization and so make them liable to expulsion therefrom, *but it would vitiate their security, making them liable for any money of their principals lost in the transaction.*

8. So far as the intention of Schwartz, Dupee & Company and Jamieson & Company is concerned, *it would obviously not be to their interest, in any aspect of the case, to gamble.*

Second. Did W. H. & J. H. Moore, for whom Jamieson & Company claim they were acting, intend to gamble? Neither of the Moores was a witness in the case, nor was it claimed by Jamieson & Company on their behalf that they, or either of them, intended to gamble.

We have in the answer of Jamieson & Company the simple assertion that in the contract of August 3 they were acting for W. H. & J. H. Moore. We have in evidence the bare fact that when tender of stock was made to Jamieson & Company on the 31st of August, they refused to receive it because the Moore Brothers, for whom they had acted, would not receive it from them. Why the Moore Brothers would not receive it is a matter of conjecture.

There is certainly no evidence that they, or either of them, intended to gamble.

Third. Did any intermediate purchaser between July 16 and August 3, intend to gamble? The names of these persons could not be traced except from examination of the private books of the brokers. The result of such examination was stipulated into the record and can be found on page 76, *et seq.*, of the transcript. No person named in this stipulation was examined as a witness, or his intention sought to be discovered. There is, therefore, no evidence that any intermediate purchaser intended to gamble.

Fourth. Did Henry Clews & Company intend to gamble? Their intention in the premises has not been made an issue in the case; no member of the firm was called as a witness; no other witness was interrogated on the point. So far as *oral* testimony is concerned, there is no evidence of an intention on the part of Henry Clews & Company to gamble.

Fifth. Was there any circumstance developed in the testimony from which an intention of Henry Clews & Company to gamble could be reasonably inferred—any course of dealing covering any period of time, anything in the financial status or usual business of the petitioners that would make a transaction of the kind incongruous? The testimony shows that the usual and ordinary business of the petitioners was the buying and selling of corporate stocks; that they should have sold the particular stock, therefore, was neither out of place nor out of character. Whether at the time of making the sale they actually owned the stock to answer to it, does not appear; and we respectfully submit that it does not matter. That they had the means of procuring the stock is pretty evident from the fact that it was tendered, and that the title thereto when tendered passed to Jamieson & Company. Indeed, it was one of the duties of their brokers, Schwartz, Dupee & Company, under their contract of employment, to furnish the stock in the first instance.

See *Markham* v. *Joudon*, 41 N. Y. 235–239.

Was it the original intention of Clews & Company not to deliver the stock, even though they might own or control it? The evidence is likewise silent on this point, and in view of the authorities, likewise immaterial. BUT THAT THERE COULD BE NO MUTUAL UNDERSTANDING AND AGREEMENT BETWEEN CLEWS & COMPANY AND ANY PURCHASER, MEDIATE OR IMMEDIATE, ORIGINAL OR ULTIMATE, NOT TO DELIVER THE NUMBER OF SHARES CONTRACTED FOR, IS ABSOLUTELY CERTAIN, FROM THE FACT THAT HENRY CLEWS & COMPANY DID NOT EVEN KNOW WHO SUCH PURCHASERS WERE.

Sixth. Was there, then, anything in the documentary evidence or the rules and customs of the stock exchange which indi-

cated an intention to gamble? Let us commence at the beginning.

On the 16th day of July, 1896, complainants wired their brokers, Schwartz, Dupee & Co., as follows:

"Sell 500 Diamond Match at 220½ for account."

On the same day Schwartz, Dupee & Co., notified the complainants as follows:

"Sold 500 Diamond Match at 221⅛ for the account."

To whom was this sold? Complainants were not at the time advised, but they *were* advised that a contract had been entered into on their behalf whereby they contracted with Somebody to deliver to him on the last day of July, 1896, 500 shares of Diamond Match Stock for $221.12½ per share. And it is stipulated that such a sale was made. (Tr. p. 119.)

Stopping at *this* point, and in the absence of any other testimony, what is to be said of this contract? Is it *prima facie* illegal?

One thing certain, it is not a contract for a *privilege* or an *option*. It *obligates* the complainants *to deliver* a certain number of shares to the contractee at a certain time and at a certain price. If it is *prima facie* illegal, *so is every other contract for future delivery.*

Does the contract indicate an intention to gamble? Would any court permit a jury *to infer a mutual understanding and intention* of the parties *not* to deliver or receive the shares contracted for from the terms of a contract which said they must?

But the question recurs, at *what point* in the history of this transaction *did it become evident* that the *original intention* of the complainants was to gamble? Or when was the *absolute* contract for sale converted into an *optional* contract to sell or not to sell?

CERTAINLY NOT ON THE 16TH DAY OF JULY. DURING TWENTY-FOUR HOURS, THEREFORE, THE CONTRACT APPEARED TO BE BOTH LEGAL AND BINDING.

Let us proceed to the day following, when we will assume that there was substituted by the manager of the stock exchange for the original contractee a new purchaser at a lesser price.

Nobody will contend that ordinarily the complainants or their agents would be *bound to consent* to this substitution. Ordinarily, and according to the conventional contract, the parties would remain the same *to the end*, in which event, we venture to say, the Court of Appeals would not have branded the contract as unlawful or the parties to it as amenableto the criminal code.

But (and to this question, so it seems to us, the whole controversy has reduced itself) *would the consent of the complainants to the novation of the contract and the substitution of a new contractee render it illegal? If so, why? If the original contract indicated no intention to gamble*, what element in the new contract would indicate such an intention? Petitioners certainly had a right to make the novation if their contractee would assent to it.

Whether either party could be *induced* to consent to the novation would depend entirely upon circumstances.

The manager of the stock exchange clearing house, in whom is vested plenary authority to make these substitutions, makes them according to the *number* of shares sold, without reference to the *price*. It is an immense service *to him* in keeping books and in effecting exchanges.

He, therefore, we will say, undertakes to substitute for A (the original purchaser), B, *who has purchased a like number of shares*. B, however, instead of purchasing his shares at 221⅛ agreed to take them, we will say, only at 220. *He would not consent, therefore, to be substituted under a contract that called for the payment of* 221⅛ *per share, nor could the seller be expected to accept as a substitute some one who agreed to pay only 220 per share.* But if the substitution is to take place, *if this great advantage in bookkeeping and facilitating exchanges is to be realized,* some method *must* be devised whereby petitioners will be willing to accept B, and B will be willing to accept petitioners.

Obviously this can only be done by *equating* the prices. *If this is done the parties can have no reasonable excuse for withholding their consent. It would be a distinction without a difference.* Neither party would be *benefited,* neither party would be *injured;* neither party would *make* a cent, neither party would *lose* a cent, by the transaction. THE ONLY POSSIBLE BENEFIT, THEREFORE, WOULD BE TO THE EXCHANGE ITSELF, AND THE ONLY POSSIBLE OBJECT WOULD BE THE AVOWED OBJECT OF FACILITATING BOOKKEEPING AND EXCHANGES.

Surely this object is not an unlawful one.

What we are in search of, however, is evidence of an intention to gamble, and this the Circuit Court of Appeals affect to find, *not in prior dealings of the parties* (for, so far as the testimony reveals, this was the only transaction ever had between them), *not in the original contract itself* (for that was absolute and unequivocal for the sale of a number of shares of stock at a certain price at a certain time), but in the subsequent mutations of the contract growing out of the rules and customs peculiar to the stock exchange, *involving no risk to the complainants, no possibility of gain or loss to them, modifying in no essential particular the original purpose of the complainants, affording no motive or object to the complainants to assent to it, except the motive to accommodate the exchange itself.*

Of course the sale of August 3d in the case at bar stands on its own bottom. It was a *new* contract. The original contract had been extinguished. There could not have been a "novation" *except* it had been extinguished. In legal contemplation the complainants must be regarded as having authorized their agents, Schwartz, Dupee & Co., on August 3d, to make the contract they did with Jamieson & Co.

We are frank to say that it required a careful study of the English cases cited in our principal brief to straighten this out in our own minds. We were conscious of a persistent mental effort to associate the contract of August 3d with the contracts of July 16th and 21st. Not until the careful and painstaking reasoning of Justice Blackburn demonstrated that the original contract was the *cause* and the ultimate contract was the *effect*, and that there was at most only a casual connection between them, did the great machinery of clearances, evolved through commercial necessity, become comprehensible and beautifully simple.

Respectfully submitted,

HENRY CLEWS,
CHARLES M. FOSTER,
JAMES B. CLEWS,
Petitioners.

By FRANK O. LOWDEN,
HERBERT J. DAVIS,
HENRY D. ESTABROOK,
Counsel for Petitioners.

HENRY D. ESTABROOK,
Of Counsel.

No. 245.

FILED
OCT 2 1900
JAMES H. McKENNEY,
Clerk.

Brief of Estabrook for Petitioners.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

Filed Oct. 2, 1900.

No. 245.

HENRY CLEWS, CHARLES M. FOSTER AND JAMES B. CLEWS,

Petitioners,

vs.

MALCOLM M. JAMIESON, ROLAND C. NICKERSON, HARRY F. BILLINGS, EDWIN G. FOREMAN, CHARLES HENROTIN ET AL.,

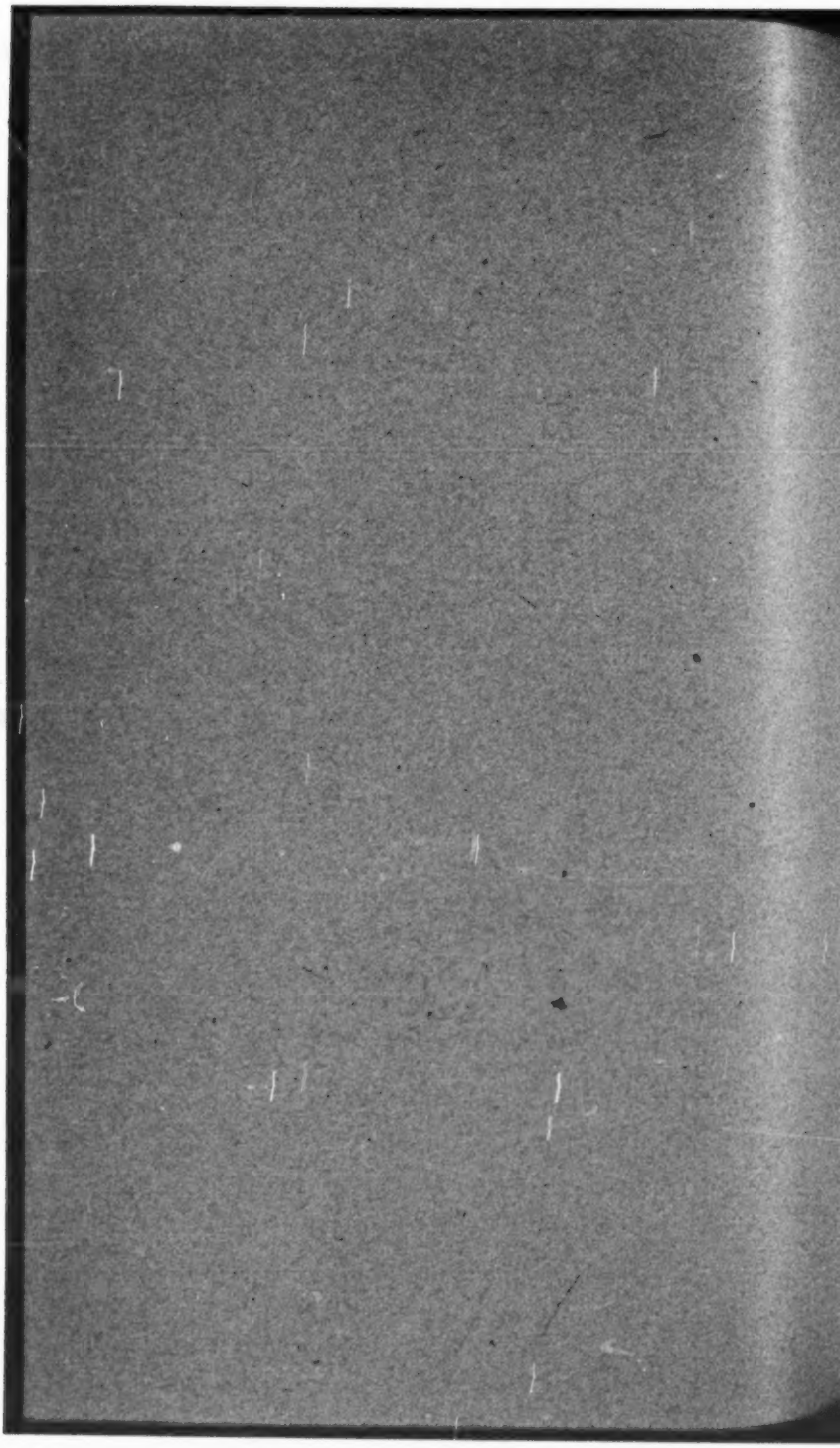
Respondents.

BRIEF FOR PETITIONERS.

MR. FRANK O. LOWDEN,
MR. HENRY D. ESTABROOK,
MR. HERBERT J. DAVIS,
Counsel for Petitioners.

MR. HENRY D. ESTABROOK,
Of Counsel.

On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, to review a decision affirming a decree of the Circuit Court of the United States for the Northern District of Illinois, Northern Division, dismissing petitioners' bill for want of equity.



IN THE

SUPREME COURT OF THE UNITED STATES.

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HENRY CLEWS, CHARLES M. FOSTER AND JAMES B. CLEWS,
Petitioners.
vs.
MALCOLM M. JAMIESON, ROLAND C. NICKERSON, HARRY F. BILLINGS, EDWIN G. FOREMAN, CHARLES HENROTIN ET AL.,
Respondents.

BRIEF AND ARGUMENT.

STATEMENT OF ISSUES.

This suit in equity was brought by the petitioners, Henry Clews & Company, to have administered and turned over to them fourteen thousand dollars in the possession of the managers of the Chicago Stock Exchange, claimed by petitioners to have been deposited in trust as security for the performance of a contract, entered into August 3, 1896, whereby the petitioners agreed to sell and deliver, and the respondents, Jamieson & Company, agreed to receive and

pay for, on the thirty-first day of August, 1896, seven hundred shares of the stock of the Diamond Match Company; which contract, it was alleged, Jamieson & Company failed and refused to perform. Petitioners' bill also asked for an accounting of the loss and damages sustained by them on account of the breach of contract, and that Jamieson & Company be decreed to pay the amount ascertained.

It was contended by the respondents, Jamieson & Company:

1. That the contract sued upon was in reality a contract between Jamieson & Company and Schwartz, Dupee & Company, a firm of brokers, to which the petitioners, Henry Clews & Company, were not parties and upon which they ought not to recover for want of privity.

2. That the contract sued upon was made through the clearing house of the Chicago Stock Exchange and according to the rules, customs and regulations of said exchange, which said rules provided, among other things, a remedy for breach of every contract made subject thereto, and that the remedy so provided was exclusive.

3. That the testimony offered by petitioners, Henry Clews & Company, proved, at most, nominal damages only.

4. That a bill in equity would not lie, the petitioners having an adequate remedy at law.

The fourth issue specified was raised on demurrer to the bill, which demurrer was overruled and the case was sent to a master to report his findings of fact and conclusions of law. The master's report found all the issues in favor of the petitioners, Henry Clews & Company, and that there was due them from Jamieson & Company, $64,400. On exceptions to the master's report, and certain new evidence stipulated into the record, the trial judge dismissed the bill of petitioners for want of equity, although his written

opinion, set forth in the record, bases the decision solely on the ground of want of privity.

5. On appeal to the United States Circuit Court of Appeals for the Seventh Circuit, the decision of the Circuit Court was affirmed, *not on the only ground which formed the basis of the opinion of that court, nor upon any issue raised by the pleadings or argued in the brief of counsel for respondents*, but because, in the opinion of the Circuit Court of Appeals, the transaction was a gambling transaction and therefore void; leaving petitioners to recover from the stock exchange, as best they might, their money on deposit.

STATEMENT OF FACTS AND COMMENTS THEREON.

The petitioners, citizens and residents of the State of New York, at the time of the bringing of their bill against the respondents were, and for many years prior thereto had been, engaged, as copartners under the firm name of Henry Clews & Company, in doing business in the city of New York, buying and selling stocks, bonds and other securities. The respondents, Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings, were at the time citizens and residents of the State of Illinois, doing business as a copartnership, under the name of Jamieson & Company, buying, selling and exchanging bonds, stocks and other securities, and also doing a general brokerage business for the purchase and sale of like properties in the city of Chicago. The respondents, Gustavus A. Schwartz, John Dupee, John W. Conley and Isaac J. Bloom, were a copartnership under the firm name of Schwartz, Dupee & Company, engaged in like business in the city of Chicago. The other respondents constituted the governing committee of the Chicago Stock Exchange, an association formed for the purpose of opening an exchange in the city of Chicago, where its members could

meet together and buy and sell such stocks and securities as should be listed with the said exchange, and where its members could make contracts for such sales and purchases under the rules and customs of said exchange.

The contract of August 3, 1896, here sued upon, was in terms between the said Schwartz, Dupee & Company and the respondents, Jamieson & Company, members of the Chicago Stock Exchange; Clews & Company claiming that in entering into the contract Schwartz, Dupee & Company acted as their agents. The contract is evidenced as follows:

On August 3, 1896, the manager of the clearing house sent to Schwartz, Dupee & Company, members of the Chicago Stock Exchange, a CLEARING HOUSE SHEET, reading as follows:

CHICAGO STOCK EXCHANGE CLEARING DEPARTMENT.

CHICAGO, Aug. 3, 1896.

Schwartz, D. & Co.:

Tr. p. 106. We have settled all trades on your sheet this day, with the following exceptions, which have been substituted:

Bought.	Sold.	Stock.	Price.	Substitution.
	50	W. Ch'go.	103¾	Wilson & S.
	150	" "	103¾	Wasmansdorff.
	1150	*Match.*	*222*	*Jamieson & Co.*
	100	Bisc.	92	Breese & Co.
	550	"	92	Spencer.

The manager at the same time sent a CLEARING HOUSE SHEET to Jamieson & Company reading as follows:

CHICAGO STOCK EXCHANGE.

Clearing Department.

CHICAGO, August 3, 1896.

Tr. p. 95. *Jamieson:* We have settled all trades on your sheet this day with the following exceptions, which have been substituted:

25159

Bought.	Sold.	Stock.	Price.	Substitution.
	1150	M.	222	Schwartz.

On the same day Schwartz, Dupee & Company delivered to Jamieson & Company a TRADING CARD reading as follows:

CHICAGO, Aug. 3, 1896.

M. Jamieson & Co.

We hereby confirm *sales* made by us for the account to-day under the rules of the Chicago Stock Exchange, also substitution trades. Tr. p. 118.

Amt.	Kind of Property.	Price.
	Substitution Trades. Sold.	
1150	Match.	222
	Difference { Collect	287 50
	Pay	

SCHWARTZ, D. & Co.

The same day Jamieson & Company delivered to Schwartz, Dupee & Company a TRADING CARD reading as follows:

CHICAGO, Aug. 3, 1896.

M. Schwartz:

We hereby confirm *purchases* made by us for the account to-day under the rules of the Chicago Stock Exchange, also substitution trades. Tr. p. 118.

Amt.	Kind of Property.	Bought.	Price.
	Substitution Trades.		
1150	D. Match.		222
	Difference { Collect		
	Pay		287 50

JAMIESON & Co.

EXPLANATION: The words "FOR THE ACCOUNT" used in the foregoing documents are technical words. DISASSOCI- Tr. p. 34, clearing house rules, Sec. 2.

ATED FROM THE STOCK EXCHANGE THEY HAVE NO MEANING WHATEVER. FOR A CLIENT TO ORDER A SALE "FOR THE ACCOUNT" MEANS, THEREFORE, AN ORDER TO SELL ON THE STOCK EXCHANGE, AND NECESSARILY IMPLIES A KNOWLEDGE ON THE PART OF THE CLIENT OF THE RULES, USAGES AND CUSTOMS INVOLVED IN CARRYING OUT HIS INSTRUCTIONS. THE WORDS "FOR THE ACCOUNT" mean that the shares of stock bought or sold are to be delivered on the account day, *which, under the rules of the exchange would be the last day of the current month.*

Idem, Sec. 1.

All trading for "the account" in securities listed on the Chicago Stock Exchange (*i. e.*, every contract for future delivery), must be under the rules of the clearing house.

Idem, p. 36, Secs. 12 and 17.

On all trades for "the account" the buyer and seller are each required to deposit with the stock exchange clearing house a "margin" of $10 per share on all stocks selling at $100 or over per share, as a trust fund to secure the mutual performance of the contract entered into.

Tr. p. 33, Art. 16 of the by-laws, Sec. 1; also §§ 2-6, p. 34.

This trust fund is at all times to be kept unimpaired *regardless of the fluctuations of the market*, to do which necessitates additional deposits from one of the parties to the contract from day to day, and of course justifies the other party in withdrawing from such fund an amount equal to the deposit.

ILLUSTRATION: A agrees to sell and B to buy 700 shares of Diamond Match stock at $223 per share. They each deposit $7,000, *i. e.*, $10 per share. The day following the making of this contract, however, the market price of Diamond Match falls to $222 per share. A's contract, therefore, is potentially worth $1 a share less, and B's is potentially worth $1 a share more than on the previous day. To make good his security, A thereupon deposits $1 per share, *i. e.*, $700, in the trust fund. B, who is only required to keep his security unimpaired, thereupon withdraws $1

Tr. p. 118, testimony of Wilkins, Mgr. of the Exchange.

per share, *i. e.*, $700, from the trust fund. If on the following day the market returns to $223, B deposits $1 per share, *i. e.*, $700, and A withdraws $1 per share, *i. e.*, $700.

This illustration also explains the meaning of the words and figures opposite the words "pay" and "collect," in the foregoing trading cards. The card signed Jamieson & Company indicates that Jamieson & Company were required to pay $287.50 into the trust fund to make good their margin, and the card signed Schwartz, D. & Co. indicates that Schwartz, D. & Co. were at liberty to withdraw from the trust fund $287.50. It is apparent that the figures $287.50, register the fluctuations of the market during the preceding twenty-four hours.

THERE IS NO DISPUTE AS TO THE MEANING OF THESE DOCUMENTS.

Mr. Wilkins, manager of the stock exchange, asked to translate these cards, says, as to the one signed S. D. & Co.: "That card would show that they [Schwartz, Dupee & Company] had no sales and they accepted the *substitution* which I had given them for 1150 shares of Match at 222, and they [Schwartz, Dupee & Co.] *collected* $287.50." Tr. p. 118.

As to the card signed Jamieson & Company, Mr. Wilkins says: "That is exactly the same as exhibit 6, except that they [Jamieson & Company] *paid* $287.50. * * * That is, Jamieson & Company say that they have bought 1150 shares of stock at 222 and *paid* $287.50; Schwartz, Dupee & Company say that they have sold 1150 shares of Match at 222 and *collected* $287.50; that balances the stock and balances the money." Idem. p. 118.

One further explanation is perhaps called for at this time, to be more fully developed hereinafter, as to the meaning of the words "SUBSTITUTION TRADES." Their meaning is indicated in the testimony of Mr. Wilkins quoted. The

cards show that neither Schwartz, Dupee & Company nor Jamieson & Company had made any new original sales on August 3, 1896; that the 1150 shares of Diamond Match stock bought and sold by them *had been so bought and sold prior to August 3, 1896.* They further indicate that the persons, *members of the exchange*, to whom Schwartz, Dupee & Company had *theretofore* sold 1150 shares of Diamond Match stock might be, and probably were, other than Jamieson & Company; and that the persons from whom Jamieson & Company had *theretofore* purchased 1150 shares of Diamond Match stock might be, and probably were, other than Schwartz, Dupee & Company, *but that irrespective of who such former buyers and purchasers were, the manager of the exchange had novated the contract* by substituting for the persons purchasing from Schwartz, Dupee & Company, *whoever they might be*, Jamieson & Company, and by substituting for the vendors from whom Jamieson & Company had purchased, whoever they might be, Schwartz, Dupee & Company, *and that both Schwartz, Dupee & Company and Jamieson & Company had assented to the substitution*, THEREBY CANCELING ALL FORMER CONTRACTS WITH WHOMSOEVER MADE AND AT WHATSOEVER PRICE, AND ENTERING INTO A NEW CONTRACT, DATED AUGUST 3, 1896, BY THE TERMS OF WHICH JAMIESON & COMPANY AGREED TO PURCHASE UNDER THE RULES OF THE EXCHANGE 1150 SHARES OF THE STOCK OF THE DIAMOND MATCH COMPANY FROM SCHWARTZ, DUPEE & CO.; THAT THEY AGREED TO RECEIVE SUCH STOCK ON THE 31ST OF AUGUST, 1896, AND PAY THEREFOR THE SUM OF $222 PER SHARE; THAT SCHWARTZ, DUPEE & COMPANY HAD SOLD TO JAMIESON & COMPANY UNDER THE RULES OF THE EXCHANGE, 1150 SHARES OF DIAMOND MATCH STOCK WHICH THEY THEN AND THERE AGREED TO DELIVER TO JAMIESON & COMPANY ON THE 31ST DAY OF AUGUST, 1896, FOR $222 PER SHARE.

In other words, the cards construed together, and according to the rules, customs and methods of the Chicago Stock Exchange, evidence a contract, *that day executed*, between Jamieson & Company and Schwartz, Dupee & Co., but which was a novation, or a contract substituted for a contract of the day before, to which either Schwartz, Dupee & Co. or Jamieson & Co., or possibly both, had been parties.

[The stipulation of facts entered into after the coming in of the master's report, is simply an attempt to trace from the private books of the brokers the daily substitutions merging into the contract of August 3.] Tr. p. 66, *et seq.*

Of this new or substituted contract, his honor, Judge GROSSCUP, in delivering the opinion of the Circuit Court, said: Tr. p. 82.

"There can be no question that there came into existence by the transactions stated a contract, whereby, primarily between Schwartz, Dupee & Company and the defendants (respondents), the latter were obliged to purchase of the former, and the former were obliged to sell to the latter, during the month, seven hundred shares of this stock at the price of 222 per share.

"Nor can there be any doubt that the undisclosed principals of either of these parties were entitled to step into the place of these respective brokers, and in their own name, and for their own benefit, insist upon the enforcement of the contract according to its terms. Clearly, under the rules of the exchange, each of the brokers bound himself, both to the other broker and to the principal whom the broker represented, to carry out the terms of the contract.

"The only question is whether the complainants (petitioners) were parties principal to the contract between Schwartz, Dupee & Co. and the defendants. The evidence discloses that their authority to the brokers was to sell

seven hundred shares of this stock at 229; and while the authority to sell for more than this might be implied, authority to sell for less could certainly not be. They were entitled, under their contract with Schwartz, Dupee & Company, to a purchaser at 229, or more; they were bound to no sale at a figure less. Neither Schwartz, Dupee & Company, nor any persons with whom that firm had contracted, could have compelled the complainants to deliver the stock at a price less than 229.

"But the contract between Schwartz, Dupee & Company and the defendants was for the sale of seven hundred shares at 222. Under the contract between the brokers, the defendants could have demanded a conveyance at 222. But of whom could they have made such demand? Certainly not from complainants.

"Their contract was for 229, and no less.

"The devices of the exchange for clearing and counterbalancing accounts between brokers could not, *without their consent*, change so essential a term of the complainants' sale. It can not be that authority from a principal to sell at 229 can, *without his conscious assent*, be transformed into authority to sell at 222. The original understanding that the sale should be made under the rules and practice of the stock exchange can not be interpreted to give such elasticity to the all-important feature of price. *Who would deal on the exchange as principal if it were understood that the prices named had no fixity; that the obligation might be one thing to-day and another totally different thing to-morrow?* While the substitutions, resulting in prices unquestionably different from those originally authorized, bind the brokers participating, they do not, *in the absence of assent*, reach over so as to change the contract rights of the principals. To hold otherwise would be to abolish, by judicial pronouncement,

the authority on the faith and stability of which every transaction on the exchange is grounded.

"But if the defendants, under the substitution, could not hold the complainants as principals to the contract for the sale at 222, then for want of mutuality the complainants are in no position to hold the defendants. There is, indeed, no identity of contract between the one the complainants authorized and the one entered into between Schwartz, Dupee & Company and the defendants. *That the complainants now choose to accept it is of no significance;* the legal fact remains that they are not so bound, and not being so bound, the defendants on their part, are not legally bound.

"Whatever legal obligation the defendants owe is, under the contract of substitution, to Schwartz, Dupee & Company alone. Between the complainants and the defendants there is no privity, and, therefore, no enforcible obligation.

"For the foregoing reasons the bill must be dismissed."

The undisputed testimony of Mr. Comstock, connected with the firm of Schwartz, Dupee & Company, in explanation of the clearing house sheet dated August 3, 1896, is as follows: Tr. p. 106.

"Q. Mr. Comstock, on this clearing house sheet appears on line 3, the following: 'Sold 1150 Match 222 Jamieson;' will you state what that 1150 included? A. What it included?

Q. Yes. A. Well, it included the 700 Match sold for Clews & Company and 450 more for other clients."

Cross-examination waived.

It is undisputed testimony also, that on September 9, 1896, Schwartz, Dupee & Company wrote and delivered to Jamieson & Company the following letter: Testimony of Billings, one of the respondents Tr. p. 93.

"CHICAGO, September 9, 1896.

Messrs. Jamieson & Company, 187 Dearborn St., Chicago, Illinois.

DEAR SIRS: On August 31, 1896, we tendered you seven hundred (700) shares of Diamond Match stock in settlement of sales made by us. The sales made were 500 shares July 25th, and 200 shares July 27, 1896, you being substituted through the clearing house of the Chicago Stock Exchange August 3, 1896, as the purchaser of said stock.

This is to notify you that said sales were made by us as agents for Henry Clews & Co. of New York, who may rightfully take any proceedings to enforce the contracts for said sales, and who are authorized to make settlement thereof.

Very truly yours,

SCHWARTZ, DUPEE & CO."

Testimony of Billings, Tr. p. 92.

That on the 10th of September, 1896, Henry Clews & Company, by their attorneys, wrote and delivered to Jamieson & Co. the following letter:

"SEPTEMBER 10, 1896.

Messrs. Jamieson & Company, No. 187 Dearborn street, Chicago:

DEAR SIRS: This is to notify you that on Tuesday, the 15th day of September, 1896, at one o'clock P. M., we shall offer for sale, at public auction, to the highest bidder, for cash, at the judicial salesrooms of the Chicago Real Estate Board, No. 57 Dearborn street, in the city of Chicago, county of Cook and State of Illinois, seven hundred (700) shares of stock of the Diamond Match Company, and at said time and place will sell the same to the highest bidder for cash. Said sale will be made for your benefit on account of your contracts with Schwartz, Dupee & Company on the Chicago Stock Exchange, for the purchase by you of said shares, *in which contracts the said Schwartz, Dupee &*

Company were acting as agents of the undersigned, said shares of stock having been tendered you by Schwartz, Dupee & Company in fulfillment of said contracts on the 31st day of August, 1896.

You are further notified that should said stock at said sale sell for less than the amount due from you on said contracts we will look to you to settle the difference, and we will hold you responsible for any loss on account of said contracts.

The contracts of sale referred to herein are the same mentioned in the letter of Schwartz, Dupee & Company accompanying this notice.

In the meantime we hold said stock ready for delivery to you upon payment of the amount due from you under said contracts of purchase.

Very truly yours,

HENRY CLEWS & Co.,

By Estabrook & Davis,

Their Attorneys."

That other correspondence took place among the parties, set forth in the testimony of said Billings, wherein, prior to the commencement of this suit, Jamieson & Company were informed and advised that Schwartz, Dupee & Company acted for and on behalf of petitioners in the sale of August 3d, and that, as principals to said contract, petitioners had ratified and confirmed the same. Tr. idem.

We will have occasion to question the legal conclusions of the trial judge from the facts postulated in his opinion; but his statement of facts requires some modification to conform to the evidence in the case.

For instance: Nowhere in the record is there any testimony that Henry Clews & Company *in so many words* authorized their agents, Schwartz, Dupee & Company,

to sell Diamond Match stock at $229 per share. It is true that on July 25, 1896, in answer to the request of Henry Clews & Company to change their sales of Diamond Match from the July to the August account, Schwartz, Dupee & Company *notified* them that they had "bought in" 700 shares of the stock for the July account and had sold 700 shares at $229 per share for the second or August account, and by acquiescing in this sale, of which they were duly notified as aforesaid, they may be said to have authorized it. But the only sales authorized by Henry Clews & Company *in which a specific price was named*, were *prior* to the sale for $229 per share, to wit, on the 16th and 20th of July, 1896, and the prices then named were *less* than $229 per share, to wit, $220½ and $221; *and that which gives significance to all these sales, and which the trial judge apparently lost sight of, is the fact that the sale at $229 per share on July 25, 1896, and the sale at $222 per share on August 3, were different phases of the same transaction, having its origin July 16 and 20.* THEY REPRESENT THE USUAL AND ORDINARY MUTATIONS OF EVERY SALE OR PURCHASE FOR "THE ACCOUNT" UNDER THE RULES, CUSTOMS AND USAGES PECULIAR TO THE STOCK EXCHANGE.

We have seen that the contract of August 3, was a *substituted* contract, and we have asserted that the *original* contract had its initiative, *not* on July 25, as assumed by the trial judge, but on July 16 and 20. This will appear from the following correspondence.

Tr. p. 103. On the 16th day of July, 1896, at 11:19 A. M., Schwartz, Dupee & Company received the following order from Henry Clews & Company by telegram:

"Sell 500 Diamond Match at 220½ for acct.

(Signed) HENRY CLEWS & COMPANY."

On the same day, at 11:35 A. M., Schwartz, Dupee & Company telegraphed Henry Clews & Company as follows:

"Sold 500 Diamond Match at 221⅛ for the account.

(Signed) SCHWARTZ, DUPEE & Co."

On the 20th of July, 1896, at 9:23 A. M., Schwartz, Dupee & Company received a telegram reading as follows: Tr. p. 103.

"Sell 200 Diamond Match at 221 for the account at opening of market. They want put out at opening if possible, but it is good all day.

(Signed) CLEWS."

On the same day at 10:08 A. M., Schwartz, Dupee & Company telegraphed Clews as follows:

"Sold 200 Diamond Match 221½ for the account.

(Signed) SCHWARTZ, DUPEE & Co."

The foregoing is the only correspondence which took place between the petitioners and their brokers, Schwartz, Dupee & Company, until July 25, when Schwartz, Dupee & Company received the following telegram:

"Change the Diamond Match over to August account at 2½ per cent. If you can not do it let us know at once.

(Signed) CLEWS."

On the same day, at 11:58 A. M., Clews telegraphed Schwartz, Dupee & Company as follows: Tr. p. 103.

"Change the 500 at two cents or better.

(Signed) CLEWS."

On the same day, at 12:11 P. M., Schwartz, Dupee & Co., telegraphed Clews as follows:

"Bought Diamond Match 227 for the account.

Sold 500 229 account 2nd.

(Signed) SCHWARTZ, DUPEE & Co."

On July 27, at 8:55 A. M., Clews telegraphed Schwartz, Dupee & Company as follows:

"Change 200 more Diamond Match 2 per cent or better.

(Signed) CLEWS."

On the same day, at 10:53 A. M., Schwartz, Dupee & Co. telegraphed Clews as follows:

"We changed the 200 Match at 2¼ difference. Will give you prices later.

(Signed) SCHWARTZ, DUPEE & Co."

On the same day at 10:55 A. M., Schwartz, Dupee & Company telegraphed Clews as follows:

"Bought 200 Match 226¾ account. Sold 200 2nd account 229.

(Signed) SCHWARTZ, DUPEE & COMPANY."

The record shows no other correspondence to have taken place between Clews & Company and Schwartz, Dupee & Company.

It was stipulated in writing that the orders of Henry Clews & Company, and Schwartz, Dupee & Company contained in the foregoing messages were, as a matter of fact, *executed as set forth in the aforesaid messages from Schwartz, Dupee & Company on the Chicago Stock Exchange.*

Tr. p. 104.

EXPLANATION: From the foregoing testimony it is evident that Henry Clews & Company had sold for future delivery 500 shares of the stock of the Diamond Match Company at $221⅛ and 200 shares of said stock at $221½, making a total sale of 700 shares at an average price of more than $221 per share; that they had purchased 500 shares of the same stock for $227 per share and 200 shares of the same stock at $226¾ per share.

If we assume that the brokers of Henry Clews & Company had sold for them the 700 shares of Diamond Match stock to A at $221 for delivery July 31, and had purchased 700 shares of Diamond Match stock from B at $227 per share

for delivery July 31, it might save time and trouble if the same broker would, on July 31, bring A and B together, instead of having B deliver to Clews & Company and the latter deliver to A. And this would obviously be so if A and B were brokers and members of the exchange operating for undisclosed principals.

The stock exchange clearing house is designed for the purpose of facilitating just such transactions and for no other purpose.

But it is evident from the telegrams that a closing out or liquidation of the contracts of July 16 and 20 was not contemplated, but only a *change* from the July to the August account—that is to say, an extension of the time of delivery for thirty days. This change was accomplished as follows:

We have already pointed out the necessity of a deposit of $10 a share as a trust fund on all shares bought or sold. It follows, therefore, that when on the 16th day of July, 1896, Schwartz, Dupee & Company sold for Henry Clews & Company 500 shares of the stock of the Diamond Match Company for $221 per share, they deposited for and on account of Henry Clews & Company $5,000, and on their sale of 200 shares July 20, they deposited $2,000; but between July 20 and July 25 the market price of this stock appears to have advanced from $221 per charge to $227 per share—a potential loss to Henry Clews & Company of $6 per share; therefore Schwartz, Dupee & Company must have deposited in the trust fund between July 20 and July 25, $4,200, in addition to the $7,000 originally deposited.

On and after the 25th day of any month, however, the rules of the Chicago Stock Exchange permit the trading in what is known as the "second account," which, in the case at bar, would be the August account. Mr. Wilkins, man- Tr. p. 110.

ager of the exchange, explains the process of changing from one account to another as follows:

"From the 25th day of any month up to the day before delivery day, which is the day before the end of the month, I call two accounts, first account and second account. The first account is the account of the present month, which in that case would be July; the second account would have been the next account, which would have been August; then on the day before the last day of the month that stops and you go right on to the one account, which is August.

Q. These changes or transfers take place then, at what time in the month? A. Any time after the 25th.

* * * * * * *

Q. Assuming, Mr. Wilkins, that on the 25th day of July, 1896, at 11:41 A. M., a telegraphic order is received from a party in New York by a broker in Chicago, member of the stock exchange, in these words: 'Change the Diamond Match over to August account at two and a half per cent; if you can not do it, let us know at once.' Please explain to the master what is meant there by the two and a half per cent, according to the rules and customs and nomenclature of the stock exchange?

Judge McConnell: Objected to.

Tr. p. 111; testimony of Wilkins.

A. It would mean that the 500 shares of stock which they had sold for their July account they did not wish to deliver on the last day of the month, therefore they went in and bought it in for one party and sold it out again for the August account, keeping themselves short the same amount of stock *and making that difference*, (which they would,) or at least what they wanted to make, two and a half—what they would make, I don't know.

Q. What is the two and a half per cent? A. Two dollars and a half a share, $250 on every 100 shares of stock

for changing, *for carrying the stock for another broker for another month.*

Q. That would be compensation or commission? A. Interest.

Q. It is the compensation or brokerage of the— A. Hardly called brokerage.

Q. Or commission of the broker? A. It is what one party who has 500 shares of stock—one broker who has 500 shares of stock that he is carrying for a customer and that customer is not prepared to take it up and he is perfectly willing to pay whatever anybody else, who is on the other side of the market will do it for, for carrying it for thirty days.

Q. Supposing, Mr. Wilkins, that a sale of stock is made on the exchange on the 16th day of July, on account; the person who purchases is known at that time to the officers of the exchange, is he? A. Yes, sir; you mean if it is made publicly on the exchange?

Q. I mean if it is made on the floor of the exchange. A. Yes, sir.

Q. Would that person necessarily be the purchaser of that stock or the responsible purchaser of that stock on the account day of that month?

Judge McConnell: I object to that especially because it involves an expression of a legal opinion; and I stand on that objection. Tr. p. 111; testimony of Wilkins.

The Master: Let it go in subject to the objection.

A. No, sir.

Q. All sales or purchasers for the account are made through the clearing house as I understand it, to which you have referred? A. All trades made for the account must go through the clearing house."

After the witness is interrogated as to his authority for making substitutions he is asked:

"Q. Please explain to the master and myself the working of that rule. A. It simply says—I can say what it says myself, so as to have what may follow come in line with it. It says that the manager shall borrow or loan stock; it means to say that if you are a member of the Stock Exchange and put in a clearing house sheet on one morning, and in balancing that sheet you are 500 shares—you show that you are 500 shares of Diamond Match long (*i. e.*, bought), you put that sheet in, and by putting that in with the sheet in the condition it is, it is taken as authority for the manager of the clearing house to borrow that stock for you from somebody else; *that is what the clearing house is for, to save the broker the bother of doing that business himself.* The Judge might be another member of the exchange; he might put in a sheet showing that he was short (*i. e.*, sold) 500 shares of Diamond Match, in other words, just the opposite to what you would be, or there might be five different brokers on the floor, each putting in a sheet 100 shares short. If you are long, the manager of the clearing house through his clerks takes every sheet; the sheets must all balance or else the business stops and don't go on until it does balance; so that the stock and differences must balance every day before the summary is made up; therefore, if you are 500 shares of stock long on Diamond Match, there must be somebody in that clearing house who is 500 shares of stock short, or the sheets wouldn't balance; therefore the manager of the clearing house borrows from you, who may be long 500, to supply the judge, if he is short 500, or to supply five other men who are short 100 each, and in doing that the summary is made up, and they get that notice which you have just referred to.

Tr. p. 114; testimony of Wilkins.

Q. That, in effect, Mr. Wilkins, results, does it not, in the substitution from time to time, or from day to day, as the case may be, of a different purchaser or buyer of stock? A. It may or it may not."

COMMENT.

Taking the telegrams of Henry Clews & Company of July 25, and the testimony of Mr. Wilkins together, and we have an example of how a person who has contracted to deliver a number of shares of stock on the account day is enabled to make an extra profit by granting an extension of time for delivery to the second account day.

ILLUSTRATION: If A, who has agreed to purchase 700 shares of stock and pay for them $227 per share on the 31st day of July, is obliged to borrow money of the bank to meet his obligation he would, ordinarily, be required to pay interest on the money borrowed, hypothecate the shares of stock purchased, and in addition pledge a large amount of collateral. If, therefore, he can induce the vendor to extend the time of delivery thirty days by agreeing to pay him $2 per share extra (for instance), he would, perhaps prefer to do so, rather than to borrow of the bank. The process is accomplished on the stock exchange by the vendor buying of the vendee at the contract price and forthwith agreeing to sell him the same number of shares for the second account at the advanced price agreed upon. Mr. Wilkins, in his testimony, denominates this compensation "interest," in analogy, possibly, to what a banker would call it were the same result accomplished by a loan from the bank. We should presume that, legally speaking, it would be a new consideration for an agreement to extend the time of performance. The case we have supposed is an ideal one. In practice, the repur-

chase by the vendor may be from A and the resale to B through substitutions made by the manager of the clearing house.

The process is plainly illustrated by counsel for stock exchange in their brief on the petition for writ of *certiorari*, from which we quote as follows: (p. 7.)

"If the party to whom Clews & Co. had sold it, whom we will call Z, did not want to pay for it on the July delivery day and would pay interest at $2.50 per share or even $2 a share, Clews was willing to let him have the time and carry the trade, *i. e.*, not deliver the stock for another month. If, on the contrary, Z wanted the stock, but there was some third party, "A," in the market, who had bought 500 shares of "B," but did not want to pay for it until the next delivery day, then Clews' broker would buy of "A," at the market price his right to such 500 shares, get an order from "A" on "B" to deliver the shares to Z, and in turn sell back to "A" for August delivery the 500 shares which were originally sold to Z, at the market price plus the interest. In other words, with the consent of all parties, and by this process of buying and selling back, Clews & Co. would substitute "A" in a new trade for Z. To get this interest or carrying charge the dispatches of July 25th, were sent by Clews. The $2.50 and $2 spoken of in the dispatches is not commissions nor differences in settlement of stocks, but, as Wilkins testifies, is interest, pure and simple, or carrying charges. (Rec. 125.) It differs in no way from the interest the buyer would have to pay if he went to the bank and got the use of the money represented by the stock for thirty days. It depends in no way on the price of the stock, and in no way represents or marks the difference between what the stock was originally contracted to be sold for, and the market price at the day of the turn over, but

is dependent on the money market, which, in the Bryan campaign, was very high."

Applying the facts evidenced by the telegrams of July 25th to the case at bar and we have:

1. The expressed willingness on the part of Henry Clews & Company to have the time of delivery of the 700 shares of Diamond Match stock sold by them, extended from July 31st to August 31st, that is, from the first account to the second account.

2. Provided, however, that they were paid a certain price for the accommodation.

3. That the 25th of the month was the first day under the rules when such an accommodation could be asked for or would be permitted.

4. That the brokers of Henry Clews & Company were authorized to grant such an extension of time for not less than 2 per cent par value of the stock, *i. e.*, $2 per share.

5. That unless this price or better could be obtained for the accommodation, the purchaser would have no alternative but to accept the stock to be tendered on the 31st, or take the consequences of a breach of contract.

6. That the purchaser was, as a matter of fact, willing to pay the extra compensation and the change was effected by Schwartz, Dupee & Company buying 700 shares of the Diamond Match Company stock at $227 per share for the first account and selling 700 shares of Diamond Match stock at $229 per share for the second account.

7. That the effect of this transaction was to cancel the obligation of Henry Clews & Company to deliver 700 shares of the stock of the Diamond Match Company on July 31st at $221 per share and left them obligated to deliver the same number of shares of said stock on August 31st at $229 per share; that this novation had been brought about in the

ordinary course of dealing and had required a cash advance by Henry Clews & Company, or their brokers, Schwartz, Dupee & Company, of $4,200, being the difference on 700 shares of stock between $221 per share, the price sold for on July 16th and 20th, and $227 per share, the purchase price on July 25th.

8. *That according to the usual course of dealing, on trades for the account, it is probable that between July 25 and August 3, there had been substituted for the original purchasers on July 25, at $229 per share, other purchasers from day to day at other prices, the substitutions being made by the manager of the clearing house at his discretion, the parties substituted being notified of the substitution and assenting thereto in writing, and the differences in price being equated by paying into or taking from the trust fund of $14,000 on deposit.*

9. *So that when the contract of July 25th at $229 per share, through these daily novations and substitutions, had merged into the contract of August 3rd at $222 per share, all prior contracts had been canceled and annulled; that Jamieson & Company, representing, as it now appears, J. H. & W. H. Moore, had then agreed to purchase the 700 shares of stock sold by Henry Clews & Company, through their brokers, Schwartz, Dupee & Company, and receive and pay for them, on the 31st day of August, $222 per share.*

Testimony of Wilkins, Tr. p. 120.

10. *That after August 3rd, there was no further novation or substitution through the clearing house of the stock exchange, because, by resolution of its board of managers, the exchange, on August 4th, closed its doors indefinitely, not opening, as a matter of fact, until November 5th following.*

The resolution referred to is in words and figures following to wit:

"*Resolved, that the Exchange adjourn on Tuesday morning 4th*

inst., and remain closed pending further action by this committee." Tr. p. 120.

On August 31, 1896, at about 1 P. M., John W. Conley, of the firm of Schwartz, Dupee & Company, called upon the firm of Jamieson & Company at their private office; met Mr. Jamieson of that firm personally and told him that he desired to deliver 1150 shares of Diamond Match stock. Conley was referred by Jamieson to the outside office. He then went to the desk of the stock clerk and there saw Mr. Billings of the firm of Jamieson & Company, and one of the appellees herein, and told him he was there to deliver 1150 shares of Diamond Match stock and tendered certificates for the same. Mr. Billings asked to see the stock for the purpose of taking the numbers of the certificates. The certificates were passed to him. He examined same very carefully, seemed to make some memorandum of something in relation to them, pushed the certificates back with the remark that the stock exchange was closed and that the parties for whom they had bought would not receive it from them; hence they could not take it from Schwartz, Dupee & Company. Tr. p. 96.

Then followed the correspondence to which reference has already been made. Tr. pp. 92 and 93.

The following notice a few days prior to the 15th of September was thereupon mailed to every stock broker and banker in the city of Chicago. Testimony of Davis, Tr. p. 128.

"Notice is hereby given that on Tuesday, the 15th day of September, 1896, at one o'clock P. M., at the judicial salesrooms of the Chicago Real Estate Board, No. 57 Dearborn street, in the city of Chicago, county of Cook, and State of Illinois, the undersigned will offer for sale, and sell at auc-

tion, to the highest bidder for cash, seven hundred (700) shares of the capital stock of the Diamond Match Company.

HENRY CLEWS & COMPANY.

By Estabrook & Davis.

Their Attorneys."

There was also inserted an advertisement, in the same language, in the *Chicago Daily Bulletin*, a legal paper of general circulation among bankers, brokers, real estate men, and lawyers in the city of Chicago. This advertisement ran for three days. Every newspaper in the city of Chicago also made notice of this advertised sale. On the 15th day of September, at the hour appointed for the sale, there were in attendance about one hundred persons, stock brokers and people interested in the sale, at which hour it was adjourned for one week—until the 22d of September, at 1 o'clock P. M.—public announcement being made to this effect. The adjournment was noticed in all the Chicago newspapers. On the 21st of September a printed notice was again mailed to all the bankers and stock brokers in the city of Chicago—about 300 in number—which notice was as follows:

"Notice is hereby given that the auction sale advertised for Tuesday, the 15th day of September, 1896, at one o'clock P. M., at the judicial salesrooms of the Chicago Real Estate Board, No. 57 Dearborn street, in the city of Chicago, county of Cook, and State of Illinois, for the sale of seven hundred (700) shares of the capital stock of the Diamond Match Company was adjourned until Tuesday, September 22, 1896, at one o'clock P. M., at which time and at the same place, said stock will be sold to the highest bidder for cash.

HENRY CLEWS & Co.

By Estabrook & Davis,

Their Attorneys."

On the 22d day of September, at one o'clock, at the judicial salesrooms of the Chicago Real Estate Board, there were offered at public auction seven hundred (700) shares of the stock of the Diamond Match Company for sale to the highest bidder. There were present between seventy-five and one hundred people. The room was well filled. Bids started at less than par and were raised several times, until Mr. Gage, a stock broker, bid $130 per share. Mr. Barber, the president of the Diamond Match Company, was present and made a bid for 200 shares at $135 per share. *He was told that no bid would be accepted for less than the whole 700 shares unless there was also furnished a bid for the balance of the 700 shares, so that the total amount, if bid in separate amounts, would amount to more than $130 per share for the whole.* No higher bid was received for the whole of the stock. After several minutes of waiting and repeated warnings the 700 shares were struck off and sold to the said Frank N. Gage at $130 per share. An order was given Mr. Gage on Schwartz, Dupee & Co., to deliver the shares to him upon payment of the amount bid.

On September 24th, 1896, at 10:05 o'clock, there was delivered personally to Mr. Wilkins, secretary and manager of the Stock Exchange, the following letter:

SEPTEMBER 23, 1896.

To the Chicago Stock Exchange and its Governing Committee, Chicago:

DEAR SIRS: There is on deposit in the exchange twenty dollars ($20) per share on seven hundred (700) shares of the Diamond Match Company stock, sold by us to Jamieson & Company for the August account; of this amount ten dollars ($10) per share were deposited by us and ten dollars

($10) per share by Jamieson & Company to protect said contracts.

A tender of the stock was made by us to Jamieson & Company at their office, on the 31st day of August, 1896, before 1:30 P. M., as required by the rules. Jamieson & Company refused to accept the stock, and we now demand a payment to us of the amount of said deposits. Our clients in the transaction were Henry Clews & Company, and this demand is made on their behalf without prejudice to their right to recover from Jamieson & Company any damages on account of the latter's default.

Very truly yours,

SCHWARTZ, DUPEE & CO.

We concur in the above request.

HENRY CLEWS & CO.

By Estabrook & Davis.

The foregoing, testimony of Davis, Tr. p. 128.

To this letter no reply was ever made.

Tr. p. 137.

On the hearing before the master the following facts were stipulated:

STIPULATION.

That at the time complainants gave the several orders to Schwartz, Dupee & Company to sell on the Chicago Stock Exchange the various amounts of Diamond Match Company stock, and at the time said Schwartz, Dupee & Company executed said orders, said Schwartz, Dupee & Company did not have in their hands any stock of said Diamond Match Company which was the property of the complainants, nor did Schwartz, Dupee & Company at any time thereafter have in their hands any of the stock of said Diamond Match Company which was the property of the complainants.

It is admitted by the complainants that the 1150 shares

of the capital stock of the Diamond Match Company tendered to Jamieson & Company by Schwartz, Dupee & Company on August 31, 1896, were not the property of the complainants, nor any part thereof.

It is further admitted that the 700 shares of said stock alleged in the bill of complaint to have been sold on the 22d day of September, 1896, were not delivered to Frank N. Gage, but immediately after said sale said shares of stock were delivered to Major J. W. Conley, one of the firm of Schwartz, Dupee & Company, by H. J. Davis, who conducted said sale on behalf of Henry Clews & Company, for safe keeping by the said J. W. Conley; that afterwards, and on the same day, said H. J. Davis delivered to said Frank N. Gage a memorandum in words as follows:

SEPTEMBER 22, 1896.

Sold to Frank N. Gage 700 shares of Diamond Match Stock numbered A680–686, inclusive, at $130 per share.

HENRY CLEWS & CO.

Per Estabrook & Davis.

That thereupon said Gage wrote below said memorandum the following:

CHICAGO, September 22, 1896. O. K.

Please deliver above to I. H. Waggoner, Esq., and accept his check in settlement.

FRANK N. GAGE.

And thereupon said Gage redelivered said memorandum and said order to said H. J. Davis, who thereupon delivered the same to Mr. I. H. Waggoner, together with an order on Schwartz, Dupee & Company to deliver said certificates of shares to said Waggoner, upon being paid the amount of $130 per share. That said Gage was employed by said

Waggoner to bid at said sale and that said Waggoner was acting for and on behalf of the complainants in this suit in the employment of said Gage.

To this stipulation there is attached the following objection:

Complainants object to the foregoing admissions being considered as evidence; for while admitting that these are the facts, at the same time they claim that they are immaterial to the issues in this case, and object on the ground of immateriality.

It appears from the evidence that the seven hundred shares of Diamond Match stock offered at public sale were furnished under the following arrangement between petitioners, Henry Clews & Co., and their brokers, Schwartz, Dupee & Co. The stock was furnished by Schwartz, Dupee & Co. to Clews & Co. to be put up at auction. In case the stock passed out of the hands of Schwartz, Dupee & Co., Clews & Co. obligated themselves to substitute other stock either at the time owned by them or to be purchased by them.

Comstock, Tr. p. 139.

Tr. p. 140.

There was also introduced in evidence a statement of the settlement prices for Diamond Match stock after the reopening of the exchange for each day from November 5th to December 10, 1896. On November 5th (the day of reopening) the settlement price was $1.29. The lowest price for which said stock sold between November 5th and the date of trial was on December 21, 1896, when the price was $1.08½; and the highest price was on September 17, 1897, when it was $1.61½.

Comstock, Tr. p. 140.

It further appeared in evidence that Jamieson & Co. had settled with Schwartz, Dupee & Co. for 450 shares of the 1,150 shares referred to in the clearing-house sheet of August 3, 1896, and that such settlement did not include the 700 shares involved in this case.

After the report of the master, and before argument on respondents exceptions thereto, there was stipulated into the record, to be considered as evidence so far as material, a statement taken from the books of the respondents Jamieson & Co., and Schwartz, Dupee & Co., showing their daily sales and purchases of Diamond Match stock between July 25, 1896, and August 3d following. Tr. p. 66.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in affirming the decree of the Circuit Court.

2. The Circuit Court of Appeals erred in not reversing the decree of the Circuit Court.

3. The Circuit Court of Appeals, having only appellate jurisdiction, erred in not accepting the finding of fact of the master, concurred in by the trial court, that the contract here sued upon was a valid contract; there being on the part of the master no error in the application of the law and no mistake in his consideration of the evidence on which such finding was based.

4. The Circuit Court of Appeals erred in holding that the contract of August 3, 1896, was a gambling contract, the pleadings not raising the question, and no evidence having been specifically directed to such an issue.

5. The Circuit Court of Appeals erred in finding as a fact, from the record evidence, that the transaction on the Chicago Stock Exchange, resulting in the contract of August 3, 1896, under and in pursuance of the rules, customs and usages of such exchange, was a gamble or wager as to the future market price of corporate stock.

7. The Circuit Court of Appeals erred in not reversing the decree of the Circuit Court and directing a decree in favor of appellants in all respects as recommended by the master.

The foregoing specification of errors necessarily involves a consideration of all the issues disclosed by the record, and for the sake of convenience our brief and argument will follow the specification of issues rather than the specification of errors.

BRIEF OF ARGUMENT.

I.

(A.) SCHWARTZ, DUPEE & COMPANY WERE FULLY AUTHORIZED BY CLEWS & COMPANY TO ENTER INTO THE CONTRACT OF AUGUST 3D IN THEIR BEHALF, AND CLEWS & COMPANY WERE BOUND THEREBY. (B.) BUT EVEN IF UNAUTHORIZED TO ENTER INTO THE CONTRACT OF AUGUST 3D, SCHWARTZ, DUPEE & COMPANY IN MAKING IT AFFECTED TO ACT AS AGENTS OF PETITIONERS, AND THE LATTER HAVE RATIFIED THE CONTRACT AND ADOPTED IT AS THEIR OWN. (C.) AND EVEN IF IT SHOULD BE HELD THAT THE CONTRACT OF JULY 25TH, AT $229 PER SHARE, HAD BEEN LOST OR DISSIPATED, AND IN LIEU THEREOF PETITIONERS' AGENTS HAD ATTEMPTED TO SUBSTITUTE THE CONTRACT OF AUGUST 3D AT $222 PER SHARE, PETITIONERS ARE ENTITLED IN EQUITY TO AVAIL THEMSELVES OF SUCH CONTRACT. (D.) FURTHERMORE, AND IN ANY EVENT, ALL PARTIES IN INTEREST BEING BEFORE THE COURT, THERE SHOULD HAVE BEEN MADE AN END TO THE LITIGATION BY ORDERING, IF NEED BE, THE FILING OF A CROSS-BILL.

A.

Maxted v. *Paine*, L. R., 6 Ex. 132.
Hodgkinson v. *Kelly*, L. R., 6 Eq. 496.
Higgins v. *McCrea*, 116 U. S. 671.
Sheppard v. *Murphy*, 16 W. R. 948.
Hawkins v. *Maltby*, L. R., 4 Eq. 572; affirmed on appeal, L. R., 3 Ch. App. 188.
Irwin v. *Williar*, 110 U. S. 511.
Bibb v. *Allen*, 149 U. S. 481.
Dos Passos on Stock Brokers and Stock Exchanges, Chap. 5, Sub-head VII.

B.

Hagedorn v. *Oliverson*, 2 M. & S. 485.
Cook v. *Tullis*, 18 Wall. 338.
Shoninger et al. v. *Peabody*, 17 Atlantic Rep. 279.
Wharton on Contracts, Sec. 2.
Wharton on Agency, Sec 81.
19 Cent. Law Journal, 482.
See doctrine of Mr. Mechem (Agency, Sec. 179) criticised; 25 Am. L. Reg. p. 74; 9 Harvard L. R. p. 64.

C.

Cook v. *Tullis*, *supra*.
Pomeroy's Equity Jurisprudence, Vol. 2, Sec. 1051.
Bank v. *Insurance Co.*, 104 U. S. 54.

D.

Sims v. *Burk*, 109 Ind. 214.
Chamley v. *Lord Dunsany*, 2 Schoales & Lefroy, 690.

II.

THE REMEDY PROVIDED BY THE RULES OF THE STOCK EXCHANGE FOR BREACH OF CONTRACT, DOES NOT OUST THE COURTS OF JURISDICTION, FOR THE FOLLOWING REASONS:

1. THE RULES DO NOT DECLARE SUCH REMEDY TO BE EXCLUSIVE.

2. SUCH A PROVISION IN A CONTRACT WOULD BE AGAINST PUBLIC POLICY AND VOIDABLE.

3. PARTICULARLY IN VIEW OF THE INDEFINITE CLOSING OF THE STOCK EXCHANGE.

1.

Tr. p. 123. Article VII of the by-laws of the Stock Exchange.

Tr. p. 124. Article XVII of the by-laws of the Stock Exchange.

2.

Gourlay v. *Duke of Somerset*, 19 Ves. Jr. 429.

Waugh v. *Shlenck*, 23 Ill. App. 433.

Birmingham Fire Insurance Co. v. *Pulver*, 126 Ill. 338.

Mentz v. *Armenia Fire Insurance Co.*, 79 Pa. St. 478; S. C., 21 Am. Rep. 80.

Scott v. *Avery*, 5 H. of L. Cas. 811.

Home Insurance Co. v. *Morse*, 20 Wall. 445.

Kinney v. *B. & O. Employes' Association*, 35 W. Va. 385; S. C., 15 L. R. A. 142.

Dos Passos on Stock Brokers and Stock Exchange, pp. 78–83.

3.

Morse, Arbitration and Award, pp. 229, 234, 236, and authorities cited.

III.

THE PRICE BID FOR 700 SHARES OF DIAMOND MATCH STOCK AT THE PUBLIC SALE CONDUCTED AT THE INSTANCE OF PETITIONERS, RAISED A PRIMA FACIE PRESUMPTION OF VALUE WHICH, IN THE ABSENCE OF CONTROVERTING EVIDENCE, BECOMES CONCLUSIVE. PARTICULARLY IS THIS TRUE WHEN THE METHOD OF ESTABLISHING VALUE URGED BY RESPONDENTS AS THE EXCLUSIVE METHOD WOULD HAVE RESULTED IN GREATER LOSS TO THE RESPONDENTS.

Knowlton v. *Fitch*, 52 N. Y. 288.

White v. *Smith et al.*, 54 N. Y. 522.

Fisher v. *Newark City Ice Co.*, 62 Fed. Rep. 569; affirmed, 76 Fed. Rep. 427.

Benjamin on Sales, Book II, Chap. 5.

Rhea v. *Riner*, 21 Ill. 526.

Wade v. *Moffett et al.*, 21 Ill. 110.

Seckel v. *Scott*, 66 Ill. 106.

Barrow v. *Window*, 71 Ill. 214.

Owens v. *Weedman*, 82 Ill. 409.

Bagley v. *Findlay*, 82 Ill. 524.

Ullmann v. *Kent*, 60 Ill. 271.

Saladin v. *Mitchell*, 45 Ill. 84.

Benjamin on Sales, Sec. 794.

Hayes v. *City of Nashville*, 80 Fed. Rep. 641.

Morris v. *Wibaux*, 159 Ill. 646.

Fidelity Co. v. *Roanoke Iron Co.*, 81 Fed. Rep. 449.

Mulvey v. *Gibbons*, 87 Ill. 367.

Gibbons v. *Hoag*, 95 Ill. 45.

Jenkins v. *Pierce*, 98 Ill. 646.

And see particularly the case of *Cunningham* v. *Macon & Brunswick R. R.*, 156 U. S. 400.

Collins v. *Riggs*, 14 Wall. 491.

Strauss v. *Labsap*, 59 Mo. App. 260.
Weld v. *Rees*, 48 Ill. 428.
Jacobs v. *Turpin*, 83 Ill. 424.

IV.

THIS SUIT WAS PROPERLY BROUGHT (AND PETITIONERS CAN HAVE ADEQUATE RELIEF ONLY) IN A COURT OF EQUITY; AND FOR THE FOLLOWING REASONS:

1. BECAUSE THE FUND IN THE POSSESSION OF THE MANAGERS OF THE STOCK EXCHANGE IS A TRUST FUND WHICH EQUITY IS ASKED TO ADMINISTER.

2. BECAUSE IT IS DOUBTFUL IF AN ACTION AT LAW WOULD LIE IN THE NAME OF THE PETITIONERS AGAINST THE STOCK EXCHANGE.

3. BECAUSE IF THE PETITIONERS COULD SUE THE STOCK EXCHANGE AT LAW THE REMEDY WOULD NOT BE AS COMPLETE NOR AS EFFECTUAL AS THE RELIEF IN EQUITY.

4. BECAUSE THE CONTRACT OF JAMIESON & COMPANY WAS A SINGLE CONTRACT FOR THE PURCHASE FROM SCHWARTZ, DUPEE & CO. OF 1150 SHARES IN WHICH THE PETITIONERS WERE INTERESTED ONLY TO THE EXTENT OF 700 SHARES.

1.

For definitions of "deposit," "bailment," and "trust," citing:
Story on Bailments, Ch. 1, Sec. 2.
Edwards on Bailments.
2 Black. Com., 452.
Jones on Bailment, 117.
Rapalje's Law Dictionary, Tit. "Deposit."

Cases in point:
Manhattan Bank v. *Walker*, 130 U. S. 267.
Goodenow v. *Snyder*, 3 G. Green, Ia. 599.

Coster v. *Murray*, 5 Johns. Ch. 532.
Kane v. *Bloodgood*, 7 Johns. Ch. 90.
McCrea v. *Purmort*, 16 Wend. 460; S. C., 30 Am. Dec. 103.
Gutch v. *Fosdick*, 48 N. J. Eq. 353.
Levi v. *Evans*, 6 C. C. A. 500.
McCampbell v. *Brown*, 48 Fed. Rep. 795.
National Park Bank v. *Halle*, 30 Ill. App. 17.
Warner v. *Martin*, 11 How. (U. S.) 209.
Pomeroy's Equity Jurisprudence, Sec. 158.
Bailey v. *Ins. Co.*, 114 Mass. 177.

2.

National Bank v. *Insurance Co.*, 104 U. S. 54.
Dillon v. *Ins. Co.*, 44 Md. 386.

3.

Boyce's Ex'rs v. *Grundy*, 3 Peters, 215.
Oelrichs v. *Spain*, 15 Wall. 211.
McConihay v. *Wright*, 121 U. S. 201.

4.

Phillips v. *Edsall*, 127 Ill. 535.
Chapman v. *Shattuck*, 3 Gil. (Ill.) 49.

V.

A. THE CONTRACTS OF SALE AS ORIGINALLY ENTERED INTO BY SCHWARTZ, DUPEE & COMPANY ON BEHALF OF CLEWS & COMPANY JULY 16 AND JULY 20 WERE IN ALL RESPECTS CONVENTIONAL, AND BOUND CLEWS & COMPANY TO DELIVER A SPECIFIED NUMBER OF SHARES AT A SPECIFIED TIME AT A SPECIFIED PRICE, AND WERE THEREFORE PRIMA FACIE VALID. B. SUCH CONTRACTS WOULD NOT BE INVALIDATED EVEN IF THE TESTIMONY SHOWED (WHICH IT DOES NOT) THAT AT THE TIME OF ENTERING INTO THEM CLEWS & COMPANY DID NOT OWN OR CON-

TROL THE NUMBER OF SHARES OF THE PARTICULAR STOCK CONTRACTED FOR. C. SUCH CONTRACTS BEING PRIMA FACIE LAWFUL COULD NOT BE VOIDED AS WAGERING CONTRACTS BY SHOWING THAT ONE PARTY ONLY SO UNDERSTOOD AND MEANT THEM TO BE. TO VOID SUCH CONTRACTS AS WAGERING CONTRACTS, THE PROOF MUST GO FURTHER, AND SHOW A MUTUAL AGREEMENT AND UNDERSTANDING OF THE PARTIES, COLLATERAL TO THE OSTENSIBLE CONTRACT OF SALE, THAT THE SUBJECT-MATTER OF THE CONTRACT SHOULD NOT BE DELIVERED OR RECEIVED, BUT THAT SETTLEMENT SHOULD BE MADE ACCORDING TO DIFFERENCES IN PRICE. D. AND SUCH COLLATERAL UNDERSTANDING MUST BE PLEADED AND FOUND AS A FACT FROM EVIDENCE DIRECTED TO THE PARTICULAR ISSUE, WITH THE BURDEN OF PROOF UPON THE PARTY SEEKING TO IMPEACH THE TRANSACTION, FAILING WHICH THE COURT IS WITHOUT WARRANT OR AUTHORITY TO IMPUTE UNLAWFUL MOTIVES OR INTENTIONS TO PARTIES LITIGANT; PARTICULARLY WHERE, AS IN THE CASE AT BAR, THERE IS NOT A SCINTILLA OF EVIDENCE INDICATING AN INTENTION TO GAMBLE ON THE PART OF ANY PERSON CONCERNED. E. THE SUBSEQUENT MUTATIONS OF THE CONTRACTS OF JULY 16 AND JULY 20, IN PURSUANCE OF THE USUAL AND CUSTOMARY METHODS OF THE CHICAGO STOCK EXCHANGE, DID NOT OPERATE TO CONVERT A CONTRACT OTHERWISE LAWFUL INTO A GAMBLING CONTRACT; FOR AT NO SUBSEQUENT PHASE OF THE TRANSACTION WERE CLEWS & COMPANY RELEASED FROM THEIR ORIGINAL OBLIGATION TO DELIVER THE FULL NUMBER OF SHARES CONTRACTED FOR AT THE TIME SPECIFIED, AND BY NO POSSIBILITY COULD THEY RECEIVE FOR THOSE SHARES A GREATER OR LESSER AMOUNT THAN THE SUM ORIGINALLY AGREED TO BE PAID. F. A CONTRACT FOR THE DELIVERY OF A COMMODITY AT A PRICE CERTAIN AND AT A TIME SPECIFIED, IS NOT AN OPTION CONTRACT AND IS NOT,

THEREFORE, WITHIN THE OPERATION OF THE STATUTES OF ILLINOIS PROHIBITING OPTION CONTRACTS.

Kirkpatrick v. *Bonsall*, 72 Pa. St. 158.
Smith v. *Bouvier*, 70 Pa. St. 332.
Porter v. *Viets*, Fed. Cas. 11,291.
Hentz v. *Jewell*, 20 Fed. Rep. 593.
Clarke v. *Foss et al.*, 5 Fed. Cas. 2852 (7 Biss. 540.)
Ward v. *Vosburgh*, 31 Fed. 12.
Sawyer, Wallace & Co. v. *Taggart*, 77 Ky. 727.
Gregory v. *Wendell*, 40 Mich. 432.
Hatch v. *Douglass*, 48 Conn. 116.
Irwin v. *Williar*, 110 U. S. 499.
Rountree v. *Smith*, 108 U. S. 269.
Warren & Co. v. *Scanlan*, 59 Ill. App. 138; 68 Ill. App. 213; 169 Ill. 142.
Jamieson v. *Wallace*, 167 Ill. 388.
Soby v. *People*, 134 Ill. 71.
Edwards v. *Hoeffinghoff*, 38 Fed. 640.
Bangs v. *Hornick*, 30 Fed. 97.
Union Natl. Bank v. *Carr*, 15 Fed. Rep. 438.
Hansen v. *Boyd*, 161 U. S. 397.
Lehman v. *Feld*, 37 Fed. Rep. 852.

ARGUMENT.

I.

A.—Question of Privity.

The opinion of Judge Grosscup after a casual reference to the sales of July 16 and 20, 1896, dismisses them utterly from consideration in the following language:

Tr. p. 80. "Later in the month, at the instance of the complainants, these transactions were changed to the August account, at 229."

The method by which this change was accomplished, or how the sale for the August account had evolved out of the sales for the July account, or what possible relationship there could be between them, the learned judge makes no effort to discover. His entire reasoning is consequently based upon two false premises, to wit:

First. He assumes that the only sale *authorized* by Clews & Company was of 700 shares of the stock of the Diamond Match Company at $229 per share; whereas there is no evidence whatever that Clews & Company had, in so many words, ordered a sale at $229, the fact being that the only sales authorized *at a specified price* were the sales of July 16 and 20. The sale at $229 per share on July 25 had evolved out of these prior sales in the ordinary routine incident to every sale for the account just as did the sale of August 3 at $222.

Second: The opinion assumes, therefore, that the con-

Tr. p. 83. tract of August 3 was *not* authorized by Clews & Company, and that they could not be bound by it *without their consent.* This thought is several times reiterated. For instance, it is said:

"The devices of the Exchange for clearing and counterbalancing accounts between brokers could not, *without their consent*, change so essential a term of the complainants' sale."

And again:

"It can not be that authority from a principal to sell at 229 can, *without his conscious assent*, be transformed into authority to sell at 222."

And again:

"While the substitutions, resulting in prices unquestionably different from those originally authorized, bind the brokers participating, they do not, *in the absence of assent*, reach over so as to change the contract rights of the principals."

The learned judge not only emphasizes the necessity of a "conscious assent," but refuses to *imply* such assent, for the reason that the contract of August 3 was at a price less than the contract price of July 25—the only contract alleged to have been authorized—*and therefore not made in the interest or to the advantage of Clews & Company.*

The corollary from these postulates is the very obvious one, that if Clews & Company were shown to have "consciously" consented to the change in question, they would be bound by the contract of August 3; or if it could be shown that the contract of August 3 was not to their disadvantage, their assent to it might be presumed. Now, it seems to us easily demonstrated that Clews & Company not only consciously assented to the change, but that the change was not to their disadvantage.

If on the 16th or 20th of July, 1896, Henry Clews & Company had wired their brokers in Chicago to sell 700 shares of the stock of the Diamond Match Company at $222 per share, to be delivered July 31, and their brokers, Schwartz, Dupee & Company had truthfully reported that they had

sold 700 shares of said stock at $222 per share to Jamieson & Company, to be delivered July 31, *and no change or modification of this contract thereafter occurred until the day of delivery*, at which time the shares contracted for had been tendered and refused, it would scarcely be pretended that an action would not lie by Clews & Company against Jamieson & Company for a breach of contract. The defense of want of privity, under such circumstances, would obviously be unavailing.

If on the 25th of July Henry Clews & Company had wired their brokers to obtain, if possible, an extension of time for delivery to the 31st of August following, and the brokers, having obtained the extension, so reported to their principals, this would have been a novation *sub modo* but would not have changed the mutual obligations of the parties.

A transaction such as the above represents the conventional contract of sale for future delivery *unmodified by any customs or usages peculiar to a stock exchange;* and yet so far as a client is concerned *no practical difference exists*. For in both cases the client simply instructs his broker to buy or sell a specified number of shares at a specified price to be delivered at a specified time; he secures his broker by a pledge of money, collateral, or credit in the one case as in the other; in neither case is he obliged to pay further attention to the transaction until the time arrives for delivery, at which time he delivers or receives the number of shares of stock contracted for, and pays or receives the price per share called for by the contract—no more and no less—or, failing to comply with his contract, is legally amenable for the breach.

It is apparent that so far as the client is concerned it is a matter of indifference whether his contract is executed on a

25178

street corner or on the stock exchange, provided, of course, his rights in the latter case be equal to his rights in the former case. He is aware that the stock exchange has methods of doing business peculiar to itself; he has been led to believe that by trading on the exchange rather than on the street, certain advantages will accrue. For instance: The transaction will be had with a member of the exchange who is probably acting for an undisclosed principal, but who nevertheless holds himself personally liable. He is assured that no one can become a member of the exchange until he has been investigated by a committee as to his financial and business standing. To be a member of a stock exchange, therefore, is a valuable credential. He is further given to understand that a ready market is offered for all shares listed upon the exchange, thereby saving the delay and expense of advertising or seeking elsewhere; he is further given to understand that for breach of contract by one of its members it will not be necessary to seek redress in the courts and endure the law's delays or pay the expenses incident thereto, but that prompt redress will be given him, his damages measured by legal standards, and execution enforced out of a trust fund at all times on deposit, or by disciplining the member in default, if need be. He is of course given to understand that the stock exchange is, and will be, at all times, a going concern for the attainment of these objects, Sundays and certain holidays excepted.

Tr. p. 123, Art IV.

Tr. pp. 122 an 123, Art. XV and IV.

Now the methods of doing business on the exchange among the members thereof is of no interest to the client if such methods produce the desired results; but if the doctrines announced in the opinions of the Circuit Court and the Circuit Court of Appeals herein are to obtain—if at its caprice a stock exchange can close its doors and cease indefinitely its usual functions, if a contract with one of its members by some

Tr. p. 123, Art. I.

hokus-pokus or manipulation is made to evaporate and disappear—if every one consenting to deal with its members according to the rules and usages prescribed by themselves is to be, not merely in popular tradition but according to judicial pronouncement, a gambler and a law breaker—then these institutions should be compelled to adopt different methods or be raided by the police.

If we resist a distinct temptation at this point to enter upon a historical consideration of the stock exchange as an institution—its genesis and centuries of development, it is only because we do not feel called upon to vindicate its morals or its modes of operation. The fact that out of the teeming, ceaseless and illimitable business transacted on the stock exchanges of this country almost from its beginning, this is the first time, so far as judicial records show, that the methods and machinery of the stock exchange have been impeached, is proof conclusive that such methods and machinery have been thoughtfully devised for the protection of legal rights. That these methods and machinery have, in particular cases, been perverted and made to cover gambling transactions, notwithstanding the penalties denounced against such dealing (Tr. p. 123, Arts. XVII and XXIX), goes without saying. But that the stock exchange itself, with all its machinery, is as necessary to modern commerce as railways, steamships, telegraphs, money or any other mechanism of exchange, is the deliberate judgment of every writer on political economy; and we respectfully submit that it should be the policy of the courts to bring these institutions and the methods, customs and usages peculiar to them, within judic[illegible]ken.

See Je[illegible]n's Money and the Mechanism of Exchange, Appleton's Ed., pp. 281 and 282, and note.

25179

See also *Political Science Quarterly*, Vol. 8, No. 2, p. 252, June, 1893, where Mr. Alexander D. Noyes, in an article, says:

"The system of clearing houses for stocks is not new. It was adopted in the New York Stock Exchange only in the early months of 1892, but it has been in existence elsewhere for at least twenty-five years. * * * Ordinarily, in the first experiments, they took the form of the so-called 'ringing out' of contracts in the same security. By this plan, if A sold B a given amount of one security, and if B had presently sold the same amount to C, the series of trades could be personally adjusted between the three traders so that the only actual exchange required would be the transfer of the securities from A to C. *Of course, the number of traders in the series might be extended indefinitely, for the system did not require that the prices at which the trades were made should have been uniform.* * * * The first official establishment of this kind in Europe was founded at the Handelskammer of Frankfort, May, 1867, principally for the purpose of dealing in government securities, United States bonds in particular. The Berlin Exchange adopted the system in 1869; Hamburg in 1870; Vienna in 1873, and London in 1876. The Paris Bourse, owing to its peculiar system of limitation on exchange membership, has never established a regular clearing house for stocks, but the same ends are attained by a voluntary comparison of accounts by brokers' representatives, similar in its general workings to the system of bank clearings."

Now while in the case at bar the actual connection of Henry Clews & Company with the Chicago Stock Exchange was most casual, and their interest in *the clicking of its machinery* even more casual, it is true that they had agreed to sell according to the rules, customs and usages of

the exchange, and must be bound thereby; but be it understood that the respondents, Jamieson & Company, members of the exchange, must be equally bound. These rules and usages become part of the contract, and this being so, what follows?

In *Bibb* v. *Allen*, 149 U. S. 481, it was said:

"It is settled by the weight of authority that where a principal sends an order to a broker engaged in an established market or trade, for a deal in that trade, he confers authority upon the broker to deal according to any well established usage in such market or trade, especially when such usage is known to the principal and is fair in itself, and does not change in any essential particular the contract between the principal and agent, or involves no departure from the instructions of the principal; provided the transaction for which the broker is employed is legal in its character, and does not violate any rule of law, good morals, or public policy."

In a note to *Horton* v. *Morgan*, 75 Am. Dec. 326, it was said:

"When the client employs a broker of the stock exchange to transact business he *necessarily* gives him the means to carry it through. The broker can, of course, only do this by making the transaction *in accordance with the course of business prevailing in the exchange* and founded upon the rules and usages of the exchange. It results as a natural consequence, that the client can not avail himself of his supposed ignorance of the way in which business is conducted by brokers."

Says Mr. Dos Passos, in his work on Stock Brokers and Stock Exchanges, Ch. 5, Sub-head 7, p. 315:

"The last step in the transaction (*i. e.*, a sale for the account) is the actual delivery of the stock or securities by

the original seller to the ultimate purchaser. This portion of the business most powerfully illustrates the influence and scope of the usages of the stock exchange upon the contract. * * *

"The usages of the stock exchange produce the legal paradox of a vendor selling to a vendee with whom he does not have any dealings, either personally or through his immediate brokers, and who frequently is not in existence in his character of purchaser when the vendor makes the sale. * * * A stock exchange transaction frequently exhibits a sale made *in præsenti* which takes effect *in futuro*, the place of the first vendee being frequently filled by another person or persons, who may purchase at a price different from that at which the first vendor originally sold.

"All these seeming incongruities result from the usages of the stock exchange and the peculiar course of dealing carried on there. But it will be observed that the rights of a vendor are not in any way infringed or diminished by these ramifications of business."

The learned author further says:

"We have seen that a sale may be made either for money or for the account. * * * *If for the account, a vendor who launches a sale upon the exchange knows, or is presumed to know, that his vendee is not necessarily the person to whom his broker originally makes the sale, but may be a different person purchasing for some intermediate jobber at a subsequent date, and to whom delivery is to be ultimately made.*"

In England several cases have arisen which, it seems to us, throw light on the subject. A most thoroughly considered case is that of *Maxted* v. *Paine*, 6 L. R. E. 132, decided in 1871. The methods therein analyzed are but a step removed from the clearing house methods adopted by the

London Exchange five years later, and more recently by the Chicago Exchange.

The opinion of Judge Blackburn in this case ought to have especial weight, for the learned jurist, as is well known, devoted much attention to the law of sales. The statement of the case of *Maxted* v. *Paine* taken from the syllabus is as follows:

"The plaintiff having through his brokers on the stock exchange sold to the defendant, a jobber, ten shares in Overend, Gurney & Co., Limited, the defendant on the "name day" passed a ticket to the plaintiff's brokers containing the name of G. as the ultimate buyer. No objection was made to the name, and the plaintiff executed a transfer to G. of ten shares. It was afterward discovered that the brokers named on the ticket as G.'s brokers had been instructed to buy by S., and had, in fact, bought a large number of shares for S. as undisclosed principal. The ten shares in question (the dealings not being for specific shares) were delivered to them as part of the shares so purchased; but the name of G. was passed in pursuance of S.'s instructions, and according to an arrangement by which G., who was a person of no means, consented to allow his name to be passed in consideration of a sum of money paid to him. The purchasing brokers as well as the defendant, were ignorant of this arrangement. Calls having been made on the shares which the plaintiff was compelled to pay, and which he was unable to recover from G., he brought this action to recover them from the defendant."

The principal defense was a novation by which defendant was released. Opinions were delivered by BLACKBURN, SMITH, LUSH, JJ., and COCKBURN, C. J. The opinion of Blackburn covers pages 147 to 181 of the report, from which we have extracted the following:

25181

"All contracts on the stock exchange are made by the members among themselves as principals, and though from the fact that one of the parties is a broker, the other would have good reason to believe that there was an undisclosed principal behind, he would not know that for certain, and the contract would have the effect of making the two members liable to each other as principals. *The undisclosed principals of those two members can at law enforce, and are at law liable for the contracts made by their agents.* * * *

It appears by necessary inference, though not expressly stated, that there was a satisfactory settlement in account between all the various members of the stock exchange through whose hands the ticket had passed *as to the different, and probably very different, prices at which they had bought and sold.* On the 13th of April, 1867, more than ten months after the defendant had every reason to believe the transaction was satisfactorily ended (*i. e.*, that there had been a novation and he was discharged as the original purchaser), the plaintiff, for the first time, brought forward facts then recently discovered by him * * * by which it appears, in brief, that Foster & Co.'s client, Sir Samuel Spry, being desirous of evading the liability which he had instructed Foster & Co. to incur on his behalf, had sought out Goss, a person who, as JAMES, V. C., in *Castellan* v. *Hobson*, expresses it, on account of his vacuity might sing in the presence of a vice chancellor, and paid him forty-one pounds ten shillings to allow his name to be sent in as the transferee. Of course Goss has not paid the subsequent calls; the plaintiff has been forced to do so, and the right of action against Goss having been from the first worthless, he sought for redress. * * *

I think no one can read the above statement without

feeling that the plaintiff is entitled to relief from somebody. He has selected the defendant Paine as the person whom he sues. And what we have to determine is whether the defendant is liable. The majority of the court below have held that he is not, and I have come to the same conclusion as the majority of the court, viz., that the judgment should be affirmed; but for reasons of my own, which I think it right to state fully, though the consequence is inconvenient length."

After citing cases intimating that the practice of the stock exchange is no more than machinery by means of which the person buying procures a nominee, the learned judge continues:

"The Court of Appeal, in each of these cases, determined that the practices and usages of the stock exchange were more than such machinery, *and made it part of the contract when the sale was for the account, that there should be a novation.*"

The learned judge then goes on to consider what would have been the effect if the sale had been for cash on the exchange, instead of for the account, and adds, p. 159:

"Having said thus much I am now brought to what is the great question in the cause. What difference does it make that the contract was on the stock exchange for the account? I have no doubt that the plaintiff, now seeking to enforce a contract made on his behalf, must take the contract as it really was, *incorporating in it all the usages relative to such contracts.* And the questions, what are those usages, and what is their extent, and what do they mean, are all questions of fact to be ascertained by evidence. But when once they are ascertained the legal effect of the customs upon the contract is a question of law."

Considering this evidence and the rules of the exchange he says, p. 160:

25182

"And I may state at once that, in my opinion, the whole difficulty in these cases as to bargains for the account arises from this, that those who have framed the rules, and those who by putting them in use have established a practice and understanding which ought to regulate the rights of the parties, *have mainly had in contemplation the establishment of a clearing house, for which they have provided with admirable skill*, and they have also provided for other matters *of every-day occurrence*, such as the *payment of the price*, and the enforcing of the actual delivery of the transfers, though not perhaps quite so skillfully."

* * *

"I will now proceed to state what I understand to be the effect of the rules and usages of the stock exchange. THE GREAT AND MAIN OBJECT OF THE MEMBERS OF THE STOCK EXCHANGE IN ESTABLISHING A PERIODICAL ACCOUNT AND MAKING THEIR RULES AS TO NAME DAYS AND SETTLING DAYS AND TICKETS SEEMS TO ME TO HAVE BEEN THE SAME AS THAT WHICH HAS LED TO THE ESTABLISHMENT OF THE CLEARING HOUSE, AND WHICH I TAKE TO BE THIS, THAT THE NUMBER OF ACTUAL TRANSFERS AND PAYMENTS SHOULD BE REDUCED TO A MINIMUM, AND THAT ALL THAT CAN BE DONE BY SETTING OFF ONE CONTRACT AGAINST ANOTHER, AND SETTLING THEM IN ACCOUNT WITHOUT ANY ACTUAL TRANSFER OR PAYMENT OF CASH, SHOULD BE DONE; AND NOTWITHSTANDING WHAT I CAN NOT HELP THINKING THE MISTAKEN OBJECTIONS OF THE LAWYERS OF THE PAST GENERATION AGAINST SETTLING MATTERS IN ACCOUNT, I THINK THIS IS A LAUDABLE AND CONVENIENT OBJECT.

* * * A member of the stock exchange may also be a broker, who has principals, though their names are never disclosed, and the member of the stock exchange makes the contract as principal, and is personally liable as such. If a broker has made only one contract for one constituent to

sell, and has made only one contract for another to buy, he will require from the person with whom he has the one contract to sell that he should actually relieve his selling constituent of the shares sold, and he will require from the person with whom he has a contract to buy that he shall actually supply his buying constituent with the shares bought, so that in that simple case there is no room for economy in the number of shares actually transferred. But if, as is very commonly the case, the broker has a speculative constituent who enters into many contracts, some to buy and some to sell, in the hope that he may get a profit from the fluctuation of the market, or if he, the broker, has carried over some of these transactions to the next account, it is obvious that the broker will, on the behalf of that constituent, only wish for the transfer of the balance of such shares.

The interest, therefore, which a broker member of the stock exchange has in establishing the principle of the clearing house is the same in kind, though not so extensive in degree, as that which a jobber member has.

In order, therefore, to effectuate the clearing house object the system of "tickets" has been introduced. The 87th rule requires that the "buyer of shares, etc., shall pass a ticket for the same containing the names and address of the buyer in full, before twelve o'clock on the name day, either in the stock exchange or at the office of the seller. * * *

The member into whose hands that ticket is passed may either hold it himself or pass it on in furtherance of a contract made with another member. * * *

It is obvious that in carrying out this arrangement it may happen that a member becomes possessed of a ticket for A and B and C shares, when he is under contract to buy from one member A shares, from another B shares, and

wishes himself actually to deliver C shares, and consequently wishes to pass to his two sellers two separate tickets for A shares and B shares, respectively, and himself to continue holder of a ticket for C shares. To meet this case a power of dividing or splitting the ticket is given, which is mentioned in the 87th and 91st rules."

Speaking of the exchange of tickets, he says:

"*There may be a great many intervening members between the two. The ticket which the member A holds at the end of the name day, bearing on it the name of the member Z as the original issuer, and which contains the name and address of either a member or a non-member as the person into whose name Z intends the shares to be transferred, may have passed through the hands of as many members as might be designated by all the intervening letters of the alphabet, and may have been split a dozen times; and the issuing member may have been a jobber or a broker, and the intervening members may have been brokers or jobbers, or both, and the holding member may be either a broker or a jobber. Still the result will be that the holder of that ticket is brought in contact with the issuer of it, and both must necessarily be members of the stock exchange.* * *

Sandeman & Company, as holders of the ticket, were brought into communication with Foster & Co., as issuers of that ticket, and they mutually dealt with each other as such. I incline to think that in such case the law would imply (or, if not, a jury might, and I would without hesitation find as a fact) that there was a contract between the holder and the issuer of the ticket to perform the reciprocal duties which they owe to each other as such.

This contract, in the language of a pleader before the Common Law Procedure Act, would have been thus expressed: 'In consideration that the holders of the ticket (that is, in this case, Sandeman & Co.), at the request of the issuers (that is, Foster & Co.), promised to treat them as the

issuers and perform to them all things which the holder ought to perform to the issuer, they (Foster & Co.) then promised Sandeman & Co. to perform to them all things which the issuer ought to perform to the holder.'

If the parties entering into this contract were agents (as Sandeman & Co. were for Maxted and Foster & Co. were for Spry) I apprehend their principals, though undisclosed and unknown, would be parties to the contract, and would be subject to the same liability as their agents and entitled to have the same benefit of the contract.

The contract would be implied very much on the same principle as that on which the assignee of a bill of lading receiving the goods is held to contract with the shipowner to pay him the freight originally due from the assignor of that bill of lading.

AND THE CONVENIENCE OF IT IN THE PRESENT CASE MAY BE MADE CLEAR BY SUPPOSING A TO HOLD A TICKET ISSUED BY Z, WHICH HAD PASSED THROUGH THE HANDS OF MEMBERS WHOM WE MAY DESIGNATE BY THE OTHER LETTERS OF THE ALPHABET, AND THAT Z, WITHOUT ANY VALID REASON, REFUSED TO PAY. IF THERE IS NO PRIVITY BETWEEN A AND Z, IT WILL BE NECESSARY IN ORDER TO ENFORCE THE PERFORMANCE OF Z'S DUTY FOR A TO SUE B, B TO SUE C, AND SO ON, TILL ULTIMATELY Y WILL SUE Z, WHO WILL THUS, AT THE EXPENSE OF TWENTY-FIVE LAW SUITS, BE COMPELLED TO PERFORM HIS DUTY BY A PROCESS VERY TROUBLESOME AND COSTLY, WHILST IF THERE IS PRIVITY BETWEEN A AND Z IT MAY BE ENFORCED BY A DIRECT SUIT BETWEEN THOSE PARTIES, AND THIS IMPOSES NO HARDSHIP UPON THE ISSUER OF THE TICKET AS IT ONLY PLACES HIM IN THE SAME POSITION RELATIVELY TO THE HOLDER OF IT IN WHICH HE WOULD HAVE STOOD TOWARD HIS FIRST VENDOR IF THAT VENDOR HAD NEVER PASSED AWAY THE TICKET BUT HAD HIMSELF DELIVERED THE SHARES DIRECT. * * *

25184

Coles v. *Bristowe* and *Grissell* v. *Bristowe*, seem to me to determine that when the transfers have been delivered to the issuing member and the price is fully paid, there is a novation which frees the member who merely passed the ticket from further liability. And *Coles* v. *Bristowe* further determines that this novation does not arise from the voluntary act of the seller in accepting the substituted liability of a third party in accord and satisfaction of his contract. Coles had in that case taken alarm, and given his broker instructions to complete the transaction with Bristowe direct, and not to recognize any sub-purchasers except as nominees of Bristowe. The evidence as to this will be found at p. 151 of *Coles* v. *Bristowe* in Law Rep. 6 Eq. At p. 14 of the report of the case on appeal, in Law Rep. 4 Ch., Lord Cairns deals with this as as an ineffectual attempt to vary a contract already made.

The case therefore decides that it is part of the contract for a sale for the account, that where the price has been paid and the transfers executed to the nominees of the member who issues the ticket, and the transfers have been delivered to the member who issues the ticket, the member passing the ticket is free from further responsibility. * * *

We, sitting in a court of co-ordinate jurisdiction, must hold that there is a 'novatio,' and it only remains open to consider what that 'novatio' is, and subject to what conditions.

It will be seen from what I have written that, in my opinion, the effect of the usage is that the member issuing the ticket is much in the position of one who has issued to his immediate contractor a promissory note, promising to perform to the assign of that promissory note those duties which he would otherwise have had to perform to that immediate contractor.

If there were no custom, the person contracting to take shares would promise to accept from his vendor a transfer, and to indemnify against future calls. The contract on the stock exchange for the account is to supply him on the name day with a ticket which he may either hold or pass on. Each member through whose hands the ticket passes is in a position analogous to the indorsee of that note, and the ultimate assignee who is actually to deliver the shares, is in a position analogous to the holder of that note, and I think that the effect of the custom is that, unless what resembles notice of the dishonor of this note is given within fifteen days (according to the rules), the intermediate indorsers of the ticket are released, and then, and not till then, there is a novatio, in my opinion, between the two members of the stock exchange who are in the position of holder of that ticket and issuer of it. THE STOCK EXCHANGE COULD ONLY REGULATE THE PROCEEDINGS FOR THEIR MEMBERS, BUT IF EITHER OR BOTH OF THOSE MEMBERS WERE AGENTS FOR OTHERS, THE LAW SAYS THAT THE PRINCIPALS, THOUGH UNDISCLOSED, MAY SUE AND ARE LIABLE TO BE SUED TO THE SAME EXTENT AS THEIR AGENTS, AND NO MORE. AND THERE IS NO HARDSHIP ON EITHER PARTY IN A PRACTICE THUS UNDERSTOOD.

THE ISSUING MEMBER AND HIS PRINCIPAL HAVE NO ADDITIONAL BURTHEN OR OBLIGATION THROWN ON THEM; THE ONLY DIFFERENCE IS THAT THEY ARE LIABLE FOR THE FULFILLMENT OF THE SAME DUTIES TO ANOTHER PERSON. THE PRINCIPAL WHO INSTRUCTED HIS BROKER TO SELL, AUTHORIZED HIM TO CONTRACT WITH ANY MEMBER OF THE STOCK EXCHANGE, AND AFTER THE FIFTEEN DAYS HAVE ELAPSED, HE HAS THE SAME RIGHTS AGAINST THE ISSUER OF THE TICKET, WHO MUST NECESSARILY BE A MEMBER, THAT HE WOULD HAVE HAD AGAINST HIM IF THE CONTRACT HAD BEEN IN THE FIRST INSTANCE MADE

25185

WITH THAT MEMBER. AND THE CONVENIENCE AND SECURITY GIVEN TO THOSE WHO PASS THE TICKETS, BY A CUSTOM WHICH SECURES THAT THE FULL EXTENT OF THEIR LIABILITY ON EACH ACCOUNT SHALL BE FINALLY ASCERTAINED WITHIN FIFTEEN DAYS, IS OBVIOUS AND GREAT."

And the learned judge concludes his elaborate opinion in the following words:

"THE WHOLE MACHINERY OF THE STOCK EXCHANGE IS BASED ON THIS, THAT THE MEMBERS DEAL WITH EACH OTHER, AND ARE LIABLE TO EACH OTHER AS PRINCIPALS.

IT SEEMS TO ME THAT THE ULTIMATE NOVATION BY THE CUSTOM MUST BE BETWEEN THE MEMBERS, AND THAT WHEN IT TAKES PLACE IT PUTS THE MEMBER ISSUING THE TICKET UNDER AN OBLIGATION TO FULFILL EXACTLY THAT DUTY WHICH BEFORE THAT NOVATION HE WOULD HAVE HAD TO FULFILL TO THE MEMBER WITH WHOM HE HAD ORIGINALLY CONTRACTED."

The case from which we have thus ventured to quote so extensively decides five points:

1. That a contract for the sale of stock for the account is a contract in which the rules and customs of the stock exchange have been incorporated.

2. That the undertaking of the broker under such a contract is to furnish an ultimate purchaser and not any particular purchaser, or an ultimate buyer and not any particular buyer, as the case may be.

3. That between the date of the original contract and the date of its maturity various persons at various prices may become liable thereunder through a process of novation.

4. That the mere offer of a name, under the rules of the London Stock Exchange, does not work a substitution or a novation unless accepted, but that the lapse of fifteen days

without objection conclusively presumes acceptance, releasing the party theretofore liable.

5. That the brokers nominally dealing between themselves are, nevertheless, liable to the undisclosed principals of each, and the undisclosed principals to each other.

In *Hodgkinson* v. *Kelly*, L. R. 6 Eq. 496, which is regarded as the leading authority in England on the subject, A bought of a jobber on the stock exchange shares in a certain company; and afterward (the company in the meantime having stopped payment) B sold to another jobber shares in the same company at a lower price for the same settling day. On the name day A's name was given to B as the purchaser of B's shares. B executed a transfer of the shares to A and delivered the transfer and certificate to A's broker, who paid the price for which A purchased the shares; A afterward repaid his own broker and took away the transfer and certificates, but did not execute the transfer, and it was never registered, in consequence of which B was compelled to pay certain "calls." B brought action against A to indemnify him against all consequences flowing from the ownership of the shares subsequent to the execution of the transfer.

The court, per ROMILLY, M. R., sustained the action, and a decree was entered for the plaintiff, the opinion of the court in part reading:

"It is not, as has been supposed, that the seller of shares constitutes an agent to find out and enter into a contract with some particular buyer, or on the other hand, that the buyer does the same as to the seller, *but both parties agree to be bound by the usage of the stock exchange, which binds both parties from the beginning, but which leaves each of the parties to the eventual contract ignorant of the other until the day arrives and the instrument of transfer is executed.* It was put in argument as re-

25186

sembling a contract by which A sells to B, B to C, C to D and D to E; and at the request of B, C and D, A executes the transfer to E; but, in truth, this does not appear to me to put the case sufficiently high. IT IS, IN MY OPINION, AN ENGAGEMENT ENTERED INTO BY A ON ONE SIDE, AND E ON THE OTHER, THAT THROUGH THE INSTRUMENTALITY OF CERTAIN OTHER PERSONS, WHOEVER THEY MAY BE, CERTAIN SHARES SHALL BE SOLD AND BOUGHT, AND THEY UNDERTAKE TO COMPLETE THE CONTRACT WITH THE PERSON, WHOEVER HE MAY BE, WHO BUYS ON ONE HAND AND SELLS ON THE OTHER."

The court held that these usages were founded on common sense and common honesty, and that it was of no importance to A to know to whom his shares are to be transferred, nor is it to B to know from whence the shares come.

The machinery of the clearing house while seemingly complicated is, like nearly all machinery, very simple in its principles when once understood. IT MEANS A CONVENTIONAL CONTRACT OF SALE FOR FUTURE DELIVERY NOVATED EVERY DAY UNTIL THE DAY OF DELIVERY. Here is all the mystery there is to it.

There can be no doubt that a party contracting in his own name and on his own account has the legal right to novate a contract every hour of the day and every day in the week, substituting a new contract for the one canceled; *and it seems to us equally clear that what a person can thus do for himself, he can authorize another to do for him and be equally bound by the acts so authorized.*

Let us assume that on July 25, 1896, Schwartz, Dupee & Company had received from Clews & Company a telegraphic message, reading substantially as follows:

"Sell to whomsoever you think responsible 700 shares of Diamond Match Stock at $229 per share, to be delivered August 31st. If the person to whom you sell for any rea-

son desires subsequently to cancel the contract and you can find some one to take it off his hands at a lower price, you are authorized to cancel the original contract and accept a substituted purchaser in the stead of the first purchaser, provided you are paid the difference in money. The money, of course, you will hold to our use. If the second purchaser in turn should wish to withdraw, and you or he can find some one willing to take the shares at a still lower price, you are authorized to cancel the existing contract, as before, and in like manner accept the third purchaser, provided you are paid the difference in cash. And this you may do on like terms whenever and as often as you may see fit. On the other hand if you deem it expedient to cancel the existing contract with whomsoever it may be, and obtain a contract at an advanced price, you are authorized to make such a novation and to pay and charge to our account whatever it costs to obtain such a contract and this you are also authorized to do whenever and as often as you may deem expedient."

Now, however unusual such instructions may sound in the ears of the lawyer accustomed only to the conventional relationship of principal and agent, it can not be said that there is anything vague or indefinite or dubious about the language employed. The meaning is plain. Neither is there anything wicked, unlawful or *dolus malus* about these instructions. The only question is, can the instructions be carried out so that at all times there will exist between the principal and the person with whom the agent contracts the relationship of vendor and vendee with a privity of contract?

Assume that the agent attempts to carry out these instructions. On July 25, 1896, he sells as instructed, but in his own name, without disclosing his principal, 700 shares of Diamond Match stock to A at $229 per share, to be

25187

delivered August 31st. That the undisclosed principal would have a right of action against A for breach of this contract will not be disputed. On July 26th, however, A comes to the agent (the ostensible principal) and asks to recede from his contract, stating that B will take it off his hands at $228 per share, and that he (A) will pay the difference in cash. The agent looks at his written instructions to see if he is authorized to make such a novation. He finds the authority plainly given, in so many words, and so he consents to the arrangement, cancels the contract with A, receives the difference in price, to wit $1 per share, which he holds to the use of his principal, and enters into a new contract with B for $228 per share. *Can it be doubted that thenceforth there is the same privity between the undisclosed principal and B that had the day before existed between A and the undisclosed principal? The authority given to the agent was a continuing authority. It was as much a sanction of his particular act as though special instructions had been given him respecting the identical transaction.* If, therefore, on July 27th, B should come to the agent and request the privilege of withdrawing from his contract, offering as substitute C, who would take it off his hands at $227 per share, and should moreover offer to pay the difference in cash, the agent would have ample power to make the novation; for if he could make it once he could make it twice, and if he could make it twice he could make it every day in the month until the very day of delivery.

Assuming, then, that on August 3, C should come to the agent (the ostensible principal) and should ask consent to recede from his contract, offering Jamieson & Company as substitutes at $222 per share, agreeing to pay the difference in cash, would not the agent have authority to cancel the contract with C and enter into a new contract with Jamie-

son & Company at $222 per share, receiving the difference in price in cash, to the use of his principal, so that there should be thenceforth an absolute privity of contract between them (the principal) and Jamieson & Company?

The instructions actually given by Clews & Company to their agents, Schwartz, Dupee & Company, in the case at bar, were in all respects similar to those which we have assumed, and Schwartz, Dupee and Company did, under their instructions, only what they were authorized to do. To be sure, their instructions were not written out *in extenso*, but they were just as explicit, just as full, just as easy of comprehension as though they had been.

In the English cases there have been several attempts to set forth the precise terms of the contract between a broker and his client on a trade for the account under the rules and usages of the stock exchange.

In *Sheppard* v. *Murphy*, 16 W. R. 948, which was an action in equity brought by the vendor against an ultimate purchaser, the court held, in answer to the argument that there was no privity between the plaintiff and the defendant, that the nature of a transaction on a stock exchange by which a vendor of securities was brought into contact with an ultimate purchaser, was not a contract between the possessor of a thing at the time and another party for the delivery of a specific thing, but a contract that the person who enters into it shall, upon the day on which it is to be performed, procure persons to do a thing that he undertakes shall be done, and that upon that occasion the person who is to receive this thing, and not until that day, shall pay these persons and not the person who has made the bargain at all.

If we might venture to express the terms of the contracts between a broker and his principal, and between a broker

25188

and the fellow broker with whom he deals in a trade for the account, and in view of the rules, customs and usages of the Chicago Stock Exchange, we would say, that every stock broker, in effect, promises to give to his principal on the day of delivery the name of a purchaser, or the names of purchasers, as the case may be, a member or members of the exchange, contracting to receive and pay for the number of shares which the principal ordered sold at the price authorized, or at a different price; *provided*, however, that if the price to be paid by the purchaser or purchasers named is *less* than the price authorized, the broker will have on hand to the credit of his principal the difference in money; and *provided*, further, that if the price to be paid is *more* than the price authorized, the principal will have paid to the broker the difference in money. The principal on his part agrees, in effect, to accept the purchaser or purchasers so tendered, on the terms proposed, and deliver to him the certificates of stock. Between themselves the brokers mutually agree that they will account to each other, or with those whom they may designate as principals, on the day of accounting.

B.—Ratification.

If we assume with the lower court that the only contract authorized by Clews & Company was the sale of 700 shares of Diamond Match stock at $229 per share, and that therefore the sale of August 3rd at $222 per share was not sanctioned by the petitioners, it is evident that the petitioners are here seeking to ratify and adopt the latter contract, which their agents, however unauthorized, assert to have been made on petitioners' account.

But the trial judge, after holding that the petitioners could not have been bound by the action of their agents

(inasmuch as such action was unwarranted), further holds that the petitioners could not even *ratify* the unauthorized act of their agents. His language is as follows:

"But if the defendants, under the substitution, could not hold the complainants as principals to the contract for the sale at $222, *then for want of mutuality the complainants are in no position to hold the defendants.* There is, indeed, no identity of contract between the one the complainants authorized and the one entered into between Schwartz, Dupee & Company and the defendants. *That the complainants now choose to accept it is of no significance:* the legal fact remains that they are not so bound, and not being so bound, the defendants, on their part, are not legally bound."

We respectfully submit that this logic would do away entirely with the doctrine of ratification. Ratification presupposes an unauthorized act on the part of an agent. It presupposes that the principal is not bound *ab initio*. Consequently it presupposes that there is a time, a *locus penitentiæ*, so to speak, when there is no privity or mutuality between the principal and the party with whom his agent affected to contract in his behalf. The contract in all such cases is, pending ratification, a contract between the agent and the other party. But we have read our text books to little purpose if the law does not give the option to the principal, under such circumstances, to either repudiate or ratify the contract. If he ratifies, he adopts, as his own, the contract made by his agent and assumes it *cum onere*, that is to say, subject to all defenses which could be made in any suit by the agent himself. After ratification the principal, of course, is bound, and so is the party with whom his agent contracted. Thenceforth there *is* a privity. Indeed, *by fiction of law the ratification relates back to the very inception of the contract.*

The objection urged by the trial judge would apply equally to the contract of an infant who, apparently, is bound or not bound according to his caprice. And yet, as pointed out by Mr. Wharton (Contracts, Sec. 2), the want of mutuality must inhere in the contract itself in order to avoid it, and not depend upon the mere contingency that it may, or may not, be avoided.

Speaking on this subject he says (Idem):

"It is also said that exceptions to the rule requiring mutuality are to be found in cases where one of the parties can defend under the statute of frauds, *and in cases where an agent turns out to be acting for a principal subsequently disclosed.* But in all these cases the question of liability is raised by confession and avoidance; and if we are told that there is no contract in such cases, we must hold that there is no contract in any case in which one of the parties could interpose a good defense, no matter what that defense may be. *In all these cases also the ratification* (or non-repudiation, as it is more properly called) *does not start a new contract; it merely confirms* [and adopts?] *a contract already existing.*"

In commenting on the case of *Hagerdorn* v. *Oliverson*, 2 Maule & S. 485, where an unauthorized person, acting as a *negotiorum gestor*, obtained an insurance on a ship for the benefit of the owner, and the ship was subsequently lost, and where it was held that the owner could afterward ratify the insurance, though he would not have been bound to have paid the premium, Mr. Wharton observes (Agency, Sec. 81):

"At the first glance this would appear to have been a case in which the owner was able to play fast and loose; to say, 'if the vessel is lost, I am insured; if she is not lost, I am not insured.' But this view is only superficial. Though *personally* the owner might have had this choice,

the contract itself was absolute. The insurer who insures a ship in consideration of a premium paid in, agrees to do something for a valuable and adequate consideration. *He insures for whomsoever it may concern.* His duties are fixed on the closing of the contract. * * * WHETHER THE OWNER CAN SUE UPON THE CONTRACT IS A MERE MATTER OF FORM, FOR THE AGENT CAN SUE IN CASE THE PRINCIPAL CAN NOT. The insurer has lost nothing by the fact of the agent being unauthorized; he has been lulled into no false security; no intervening rights have been sacrificed by him. He insured the vessel on his own terms, and by those terms he is bound."

Justice FIELD, in *Cook* v. *Tullis*, 18 Wall. 338, observes:

"The general rule as to the ratification by one of the unauthorized act of another respecting the property of the former, is well settled. The ratification operates upon the act ratified *precisely as though authority to do the act had been previously given*, except where the rights of third parties have intervened between the act and ratification. * * *

"As is said in one of the cases cited by counsel, * * * 'the ratification is the first proceeding by which he (the principal ratifying) *becomes a party to the transaction;* he can not acquire or confer the rights resulting from that transaction unless in a position to enter upon a similar transaction himself.' Thus, if the individual pretending to be the agent of another should enter into a contract for the sale of land for his assumed principal, it would be impossible for the latter to ratify the contract if between its date and the attempted ratification he had himself disposed of the property."

A suit begun by the principal upon the contract of his agent has uniformly been held to be a ratification. The case of *Shoninger et al.* v. *Peabody*, 17 Atlantic Rep. 279 (a Con-

25190

necticut case, decided in 1889), will serve as an illustration of the general doctrine. An agent of a piano firm, operating a branch store under a salary and a contract for commission, sold to the defendant a piano, with the agreement that the defendant should pay for it in commissions as a stock broker in various transactions between him and the defendant. To his principals, the plaintiffs, the agent reported the piano as rented to the defendant. After the defalcation of the agent and the winding up of his business, the plaintiffs learned of the true nature of the transaction. They were evidently poorly advised, for instead of repudiating the transaction and seeking to recover the property in replevin, or its value in trover, they sued in assumpsit for the agreed price. Said the court, per LOOMIS, J.:

"The manifest wrong and injustice perpetrated upon the plaintiffs by the defendant and Day (the agent), make us regret that the principles of law applicable to the remedy chosen by the plaintiffs are not flexible enough to afford relief. * * * The whole trouble in this case arises from a mistake as to the plaintiffs' remedy. When the plaintiffs were informed of the terms of the contract made by their agent for the sale of the piano to the defendant, they had an election to repudiate the arrangement, and, by tendering back what they had received in ignorance of the terms of the sale, and demanding the piano, they could have recovered it by an action of replevin, or obtained its value in trover. But, knowing the terms of the sale, they elected to sue in assumpsit on the contract for the agreed price, and thereby they affirmed the contract and ratified the act of the agent, precisely as if it had been expressly approved upon being reported to them by the agent or the defendant; and in contemplation of law *a subsequent ratification and*

adoption of an act has relation back to the time of the act, and is tantamount to a prior command."

It is true the doctrine announced by his honor, Judge GROSSCUP, is supported by Mr. Mechem in his work on Agency, Sec. 179, where the learned author says:

"If an agent, without authority, enter into a contract with another, by which, on account of such lack of authority, the alleged principal is not bound, the principal can not, when he afterward finds that the contract is advantageous to him, affirm the contract so made and compel the other party to perform it on his part."

The reason which the author assigns for the rule announced, is the same as that given by Judge GROSSCUP, and is as follows:

"As a rule the obligations of a contract must be mutual; both parties must be bound or neither. Hence, if the contract made by the agent was not binding upon the principal because of the agent's want of authority, the contract lacks this element of mutuality and the principal not being bound the other party is free also."

The principal case cited by the author in support of his doctrine is *Dodge* v. *Hopkins*, 14 Wis. p. 630. This case has been criticised by Mr. Freeman in a learned note to *Allen* v. *Bartholomew*, 5 Am. State Reports, p. 109, and defended by Mr. Mechem in an article in the 24th American Law Review, p. 450, criticised in an article in the 25th Am. L. R., p. 74, and in an article in the 9th Harvard L. R., p. 64.

From the article in 25th A. L. R., p. 74, we quote as follows:

"The writer believes the correct doctrine to be that announced by Mr. Wharton.

"It is the only view which allows full force to the maxim, '*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*.

23191

On all hands it is admitted that the ratification of the principal relates to the time of the contract and is equivalent to a previous authority to the agent. From the ratification the principal becomes, for all purposes, bound by the contract from the time of its execution. If, then, the other party be not bound from such time, the ratification is not, as to such party, equivalent to a previous authority. The maxim in such case would be only half-way true. No such right accrues to the principal as would have accrued to him had there been a prior command, and no such liability devolves upon the other party as would have devolved upon him had there been a prior command. At the same time the same liability devolves upon the principal as would have devolved upon him had there been a prior command, and the same benefits accrue to the other party as would have accrued to him had there been a prior command. But this is not mutuality and mutuality is the essence of Mr. Mechem's rule. Thus, in a very important sense, such ratification is not equivalent to a previous authority. Had there been a previous authority both parties would have been bound from the time of the contract.

"But, Mr. Mechem objects, 'as a rule the obligations of a contract must be mutual; both parties must be bound or neither.' Yes, this is the rule, but there are numerous exceptions to it; or, more properly, this is a generalization inapplicable at times to many cases. Why may not the present case be one of them?

"Let us suppose for a moment that it is not. Then the argument of Mr. Mechem is suicidal. The sword has two edges and cuts both ways. He maintains that the principal is bound from the time of his ratification, but the other party is not bound until his own subsequent ratification. During the time that elapses between

these ratifications the principal is bound while the other party is not. But where is the mutuality of this? He maintains that the principal can not by his ratification 'bind the other party also to the contract.' How, then, can the other party by his ratification bind the principal to the contract? Where is the mutuality of this? Ratification is an *agreement*, express or implied, to adopt an act performed by another for us.

"Certainly we may question the consistency of Chief Justice DIXON when, in *Dodge* v. *Hopkins*, he strongly declares for this doctrine of mutual obligation and yet, in seeking to avoid the force of the cases to the contrary, he uses this language: 'The inaccuracy consists in not properly distinguishing between those cases where the subsequent act of ratification is put forth as *the foundation of a right in favor* of the party who has ratified, and those where it is made the basis of a demand *against* him.' There is not much mutuality in this distinction.

"In Mr. Mechem's view of the case ratification is impossible. The principal before his ratification is not bound, because the act of the agent was unauthorized. The other party is not bound, because the obligation of contracts must be mutual and the principal is not bound. The principal after his ratification and before the ratification of the other party is not bound, because his ratification can not bind the other party, and the other party remains unbound and the obligations of contracts must be mutual. To hold otherwise would be to hold that one party was bound when the other was not. Nor can he be bound from the ratification of the other party until his own second ratification, because 'it can not rest with one party alone to bind the other party also to the contract.' Nor can he be bound at the time of his second ratification, because up to that time

he was not bound and the other party, in consequence, could not be, and his act could not bind the other party. And so on *ad infinitum* * * * The conclusion must be that Wharton is right or that the contract is necessarily and forever a nullity. The latter will be admitted by no one. The former, then, must be true."

On principle, we should say that the doctrine of ratification ought not to be over-refined. In the case at bar, Schwartz, Dupee & Company could have assigned their contract with Jamieson & Company and the assignee could have sued thereon, taking the contract *cum onere*, that is to say, subject to all defenses which could have been made in a suit by the assignor; the practical effect of ratification is therefore the same as an assignment.

Jamieson & Company knew, of course, that Schwartz, Dupee & Company were brokers and in all probability acting for undisclosed principals. They contracted with them and with whomsoever they might claim to represent.

C.—Petitioners' Right to Their Agent's Remedies.

If it were true that on the 25th of July, 1896, Schwartz, Dupee & Company, as agents for the petitioners, obtained for them a contract for the sale of 700 shares of Diamond Match stock at $229 per share, the petitioners furnishing seven thousand dollars cash to secure the same, and, as we have seen, some four thousand dollars cash to obtain the same—if it were true that, without authority from the petitioners, Schwartz, Dupee & Company bartered, and thereby canceled, this contract for the contract of August 3rd at $222 per share, which they made in their own name and in their own right, still using seven thousand dollars ($7,000) of petitioners' money to secure the same, then Schwartz, Dupee & Company would have been

guilty of a fraud in law whatever might have been their intention in fact. A contract—a chose in action—is *property*. If an agent converts the property of his principal into other property of a like or unlike kind, taking the title thereto in his own name and to his own use, it is a fraud upon the principal, and the law regards him as a trustee for the principal to the extent of the property so obtained.

The case of *Cook* v. *Tullis*, already cited, is an authority in point:

"Now, it is a rule of equity jurisprudence," says the opinion of Mr. Justice FIELD, page 341, "perfectly well settled and of universal application, that where property held upon any trust to keep or use or invest it in a particular way, is misapplied by the trustee and converted into different property, or is sold and the proceeds are thus invested, the property may be followed wherever it can be traced through its transformations, and will be subject, when found in its new form, to the rights of the original owner or *cestui que trusts*."

The doctrine is thus stated by Mr. Pomeroy in his work on Equity Jurisprudence, Vol. 2, Sec. 1051:

"If an *agent* or bailee wrongfully disposes of his principal's securities, and with the proceeds purchases other securities in his own name, in these and all similar cases equity impresses a constructive trust upon the new form or species of property, not only while it is in the hands of the original wrong-doer, but as long as it can be followed and identified in whosoever hands it may come, except into those of a *bona fide* purchaser for value and without notice; and the court will enforce the constructive trust for the benefit of the beneficiary owner or original *cestui que trust* who has thus been defrauded."

D.—The Duty of Equity to End Litigation.

All parties in interest were before the court. The finding of the referee and of the trial judge is, that on the 3d day of August, "there came into existence by the transactions stated a contract, whereby primarily between Schwartz, Dupee & Company and the defendants (Jamieson & Company), the latter were obliged to purchase of the former and the former were obliged to sell to the latter during the month, 700 shares of this stock at the price of $222 per share."

"Nor can there be any doubt," says the opinion, "that the undisclosed principals of either of these parties were entitled to step into the places of these respective brokers, and in their own name and for their own benefit insist upon the enforcement of the contract according to its terms."

Did Schwartz, Dupee & Company represent any principals in this transaction or was the contract made on their own behalf? They claim, both in the evidence and in their answer, to have acted on behalf of the petitioners. They disclaim any interest in the contract whatever, or in the fourteen thousand dollars deposited to secure it. The testimony further discloses that while it is true Schwartz, Dupee & Company were accountable to the petitioners under the contract of July 25, 1896, for the sale of 700 shares of Diamond Match stock, at $229 per share, the petitioners had received in cash the difference between said number of shares at $229 and $222, *so that Schwartz, Dupee & Company, in any event, would be liable only to them for the precise amount here involved.* Is it possible that, under such circumstances, respondents can escape liability, because Schwartz, Dupee & Company, whom they confessedly owe, disclaim all interest in the contract, and on that account refuse to sue, or file a cross-bill?

Had they filed a cross-bill in this case against respond-

ents they would have been entitled to recover; but it goes without saying that where all the parties in interest are before the court and an end to the matter can not be made for insufficiency of pleading, a court of equity may order a cross-bill to be filed, and in one case, at least, a decree was reversed because the court neglected of its own motion to order the filing of a cross-bill, in order that there might be an end to litigation.

See *Sims* v. *Burke*, 109 Ind. 214.

Chamley v. *Lord Dunsany et al.*, 2 Shoales & Lefroy's Rep. 689, was decided by the House of Lords in 1807, on an appeal by Chamley. The facts in the case were rather complicated, as will appear from a reading of the various opinions; "a case more entangled," said Lord ERSKINE, "than any other I ever had to consider."

For an understanding of the particular point to which we cite the case, the facts may be summarized as follows:

Messrs. Latouche had taken possession of the property of one Warren under a grant *in custodiam* of his estates. The custodian process, peculiar to Ireland at that time, is thus described by Lord REDESDALE (p. 694), and heartily condemned by him as iniquitously oppressive:

"In order to have a custodian the person who is the creditor proceeds to outlaw the debtor, and then the creditor obtains from the exchequer a grant of the debtor's estate, which is forfeited to the crown by means of the debtor's outlawry. The creditor having obtained the grant *in custodiam*, is put in possession of all the debtor's lands, and all the tenants to the estate are bound to pay their rents to him; and all prior creditors are excluded till such custodee is satisfied."

By a series of fraudulent dealings the appellant, Cham-

25194

ley, who was the attorney for the outlaw, Warren, obtained possession of a portion of the estate with the Messrs. Latouche. The Messrs. Latouche, with the fatuity of scoundrels, brought suit against subsequent mortgagees and judgment creditors of Warren, Lord Dunsany being the particular object of attack, and fraudulently obtained a master's report which would make their holding of Warren's estate practically perpetual. Lord Dunsany commenced a cross-suit. *In both these suits Warren was party defendant, but set up no claim on his own account nor did he ask affirmative relief.* From a decree pronouncing Chamley's claims to the land fraudulent, and his possession and receipt of the rents likewise fraudulent, and requiring him to account to Warren, the proceeds to go to Warren's creditors, Chamley appealed.

He urged six reasons why the decree should be reversed, the fourth and fifth (p. 691) reading as follows:

"4. That if any money was due from the appellant to Warren, the personal representative of Warren is the person to recover it, and not the respondents as creditors.

"5. For that so much of the decree as directed an account between the appellant and the co-defendants, Messrs. Latouche, was not warranted by the practice of the court, being a decree between co-defendants."

On these points Lord REDESDALE, in an opinion both luminous and voluminous, says, p. 708:

"A court of equity must pronounce its decree according to the case made and proved; and if such case and proof show that the property was held fraudulently, or in trust, or both, as in this very peculiar case, the court must so declare, and act upon it accordingly; and instead of such a declaration being objectionable, it appears to me to be the duty of a court to make it, in order to prevent a multiplicity of suits."

And further, p. 709:

"*But it seems strange to object to a decree because it is between co-defendants, when it is grounded on evidence between plaintiffs and defendants. It is a jurisdiction long settled, and acted on, and the constant practice of a court of equity; so much so that it is quite unnecessary to state any case in its support.*"

And Lord ELDON, acquiescing in these views, states, p. 718:

"It is said that a decree is made between defendants, and that such is contrary to the practice of a court of equity, because there can not be a cross-examination between co-defendants. I dwell on this objection because it has been made by the solicitor general, whose arguments are entitled to the very highest respect. Whatever he says must have considerable weight with this house, and with no member of it more than myself, who have had such opportunities of learning the extent of his talents. But, my lords, *where a case is made out between defendants by evidence arising from pleadings and proofs between plaintiffs and defendants, a court of equity is entitled to make a decree between the defendants.* FURTHER, MY LORDS, A COURT OF EQUITY IS BOUND TO DO SO. *The defendant chargeable has a right to do so. The defendant chargeable has a right to insist that he shall not be liable to be made defendant in another suit for the same matter that may then be decided between him and his co-defendant. And the co-defendant may insist that he shall not be obliged to institute another suit, for a matter that may be then adjusted between the defendants.* AND IF A COURT OF EQUITY REFUSED SO TO DECREE, IT WOULD BE GOOD CAUSE OF APPEAL BY EITHER DEFENDANT."

II.

THE REMEDY PROVIDED BY THE RULES OF THE STOCK EXCHANGE FOR BREACH OF CONTRACT DOES NOT OUST THE COURTS OF JURISDICTION FOR THE FOLLOWING REASONS:

1. THE RULES DO NOT DECLARE SUCH REMEDY TO BE EXCLUSIVE.

2. SUCH A PROVISION IN A CONTRACT WOULD BE AGAINST PUBLIC POLICY AND VOIDABLE.

3. PARTICULARLY IN VIEW OF THE INDEFINITE CLOSING OF THE STOCK EXCHANGE.

The rules of the Chicago Stock Exchange provide a remedy upon the breach of any contract made in pursuance of its rules, which remedy is, ordinarily, just, adequate and summary. Indeed, the measure of damages provided by the rules is the legal measure, and the enforcement of the remedy is far more expeditious and inexpensive than the usual law suit. These considerations account in large measure, perhaps altogether, for the fact that our law reports reveal so few cases growing out of transactions on the stock exchange; but if no case can be found where a court has assumed jurisdiction and furnished a remedy, neither is there any case where a court has refused to do so, and the question is one, therefore, to be determined upon its merits.

1. *The remedy under the rules does not purport to be exclusive.*

Article VII of the by-laws provides: Tr. p. 123.

"Section 1. All deliveries of securities must be made between 11 A. M. and 1:30 P. M., or the buyer may demand that they shall lie over until the next day without interest, when they shall be delivered before 10:30 o'clock A. M., and when deliveries are not made by that time the contract *may*

be closed under the rule, after due notice to the defaulting party, as provided in Article XVII of the by-laws."

Here, obviously, there is given the *privilege* to the party not in default of availing himself of the remedy provided by the by-laws. So far from being exclusive or compulsory, the remedy is permissive only.

Tr. p. 124.

Article XVII of the by-laws referred to in the foregoing, and pleaded by Jamieson & Company in their answer, provides the *method* of closing contracts under the rule. The material parts of it are as follows:

"Should any member neglect to fulfill his contract on the day it becomes due, the party or parties contracting with him *shall*, after giving notice as required by section 2 of the preceding article, employ an officer of the board to close the same forthwith in the exchange by purchase or sale, as the case may require, unless the price of settlement has been agreed upon by the contracting parties."

It is contended by Jamieson & Company that the word "shall" ought to be construed as "must." This is perhaps true in one sense, but not true in another. It is entirely proper, in attempting to provide a remedy, that certain methods and modes of procedure should be prescribed, and it is equally proper that those wishing to avail themselves of the remedy thus provided should be compelled to pursue the methods pointed out. In this sense, therefore, the word "shall" in the 17th by-law may properly be construed as "must"; but this is a long ways from construing the remedy as exclusive, or requiring the party to resort to it. The word "shall" is as frequently construed to mean "may" as "must," and we submit that where the jurisdiction of courts is sought to be vitiated by a contract to arbitrate, the language employed should admit of no qualification. We have seen that article VII, so far from making

the remedy exclusive, simply gives a party the privilege of availing himself of it, and the very next sentence succeeding the one above quoted from article XVII makes equally plain the intention of the rules to confer a privilege rather than to impose an obligation. The language is as follows:

"*In case of a failure of a creditor to close the contract as above* —" what will happen? Will his remedy be gone? Will his resort to the courts be forestalled? Will he lose the advantages of his contract? Not at all:

"In case of a failure of a creditor to close the contract as above, *the price shall be fixed by the price current at the time such contract ought to have been closed under the rule.*"

This is the mere affirmation of the legal rule. All that the law would permit as a recovery upon such a contract is the difference between the contract price and the current price at the day the contract ought to have been performed. If on the 31st day of August, 1896, or thereabouts, the Chicago Stock Exchange had been in operation, and sales of Diamond Match stock had been made thereon, *the price current at that time* would have afforded the measure of recovery.

The next sentence to the one last quoted is equally significant:

"In all cases where an officer *may* be directed to buy or sell securities under this rule, the name of the member defaulting, as well as that of the member giving the order shall be announced. No order for the purchase or sale of securities under this rule *shall be executed* unless made out in writing over the signature *of the party giving the order, who shall state the reason therefor;* and it shall be the duty of the officer who executes the order to indorse thereon the name of the purchaser or seller, the price and the hour at which the contract is closed, and hand the same to the secretary of the board, who shall, within twenty-four hours,

ascertain whether the party for whose account the order was given has paid the difference, if any, arising from the transaction; if not, the secretary shall report the default to the president. The duty devolved upon the officers of the exchange under this rule shall be performed without charge."

The rule proceeds to denounce certain penalties against members who shall directly or indirectly delay, hinder or evade the prompt fulfillment of such contracts. In other words, the remedy provided by the rule is not only in itself as just and adequate as the law would provide, but there is every inducement held out to the members to avail themselves of it; such as enforcing the remedy free of charge, without delay, and coercing payment of damages by discipline or expulsion. But nowhere in this rule, or any other, is there anything which, in our opinion, can fairly be construed as making the remedy provided by the rules, exclusive.

2. *An agreement to arbitrate which would oust the courts of jurisdiction is void, i. e. voidable.*

To plead a remedy provided by contract in bar to a suit at law or equity is equivalent to asking specific performance of the agreement to arbitrate, and the courts have uniformly held that specific performance of an agreement to arbitrate will not be decreed.

Gourley v. *Duke of Somerset*, 19 Ves. Jr. 429.

Dos Passos on Stock Brokers and Stock Exchanges, pp. 78 to 83.

In *Waugh* v. *Schlenk*, 23 Ill. App. 433, the court say:

"No consent of the parties can confer upon a court the power to adjudicate upon the rights of parties where the law does not confer it; neither can the agreement of parties

deprive the court of a jurisdiction conferred by the law when either of the parties seeks its aid to determine its rights. Courts can not allow their jurisdiction to be thus destroyed," etc.

When the contract distinctly provides that arbitration shall be *a condition precedent to the right of action*, various courts have held the condition valid; but such condition can not be pleaded in bar unless clearly made a condition precedent to the existence of the right of action.

See *Birmingham Fire Insurance Co.* v. *Pulver*, 126 Ill. 338.

Even in such cases it has been held that where the party in default *denies all liability*, the agreement to arbitrate *as a condition precedent*, is no bar.

See *Metz* v. *Armenia Fire Insurance Co.*, 79 Pa. St. 478; S. C., 21 Am. Rep. 80, per Sharswood, J.

Scott v. *Avery*, 5 H. of L. Cas. 811, is the leading case on this question and is quoted with approval in *Home Insurance Company* v. *Morse*, 20 Wall. 445.

See also *Kinney* v. *B. & O. Employes' Association*, 25 W. Va. 385; S. C., 15 L. R. A. 142.

3. *Closing of the exchange.*

If the remedy given under the rules professed in terms to be exclusive it could only be so construed in view of the further rule requiring the exchange to be open for the transaction of business on every business day.

Article 1, Section 1, of the By-Laws, entitled "Hours of Business," is as follows: Tr. p. 123.

"The exchange shall be open for the transaction of business upon every business day from 10 A. M. until 2 o'clock P. M."

It will be observed that the rules and by-laws contemplate the exchange as a going concern and the remedy provided by the rules was, of course, predicated upon this fact. In other words, the contention of Jamieson & Company is that a part of the contract which they entered into was a contract to *arbitrate* differences instead of resorting to a court. The arbitrators were to be the designated officers of the Stock Exchange. The articles of convention under which they were to proceed were the articles and by-laws of the association. But on the 31st day of August the Chicago Stock Exchange was closed and no definite time had been set for its re-opening. *It had incapacitated itself and its officers from fulfilling the duties of umpire and arbitrator.* This incapacity, according to all analogy, would release a party from his agreement to arbitrate, even assuming such an agreement to have been made. *It is in strict analogy to the death of an arbitrator or his refusal to act.*

See *Morse, Arbitration and Award*, pp. 229, 234, 236.

III.

THE PRICE BID FOR 700 SHARES OF DIAMOND MATCH STOCK AT THE PUBLIC SALE CONDUCTED AT THE INSTANCE OF PETITIONERS, RAISED A PRIMA FACIE PRESUMPTION OF VALUE WHICH, IN THE ABSENCE OF CONTROVERTING EVIDENCE, BECOMES CONCLUSIVE. PARTICULARLY IS THIS TRUE WHEN THE METHOD OF ESTABLISHING VALUE, URGED BY RESPONDENTS AS THE EXCLUSIVE METHOD, WOULD HAVE RESULTED IN GREATER LOSS TO THE RESPONDENTS.

The contention of Jamieson & Company is that the sale conducted by the representatives of Clews & Company was a *nullity*, for the reason that it was simply going through the form of selling 700 shares of stock *belonging to Schwartz*,

Dupee & Co. to Henry Clews & Company, thence to be returned to the possession of Schwartz, Dupee & Company, without the actual payment of money; that it was a juggling and shuffling of securities without significance, and if not a fraud in fact, was at least a fraud in law.

We have stated the proposition as brusquely we think as it is possible for the respondents to do, and will proceed to analyze it.

Undoubtedly, at the time of the tender of 1,150 shares of stock by Schwartz, Dupee & Company to Jamieson & Company, and for some time prior to such tender, the particular shares of stock *were* the property of Schwartz, Dupee & Company. It is also true that these shares, or at least 700 of them, were furnished or loaned to the petitioners, Henry Clews & Company, for the purposes of the tender and the subsequent sale, with the understanding that in the event such shares were accepted by Jamieson & Company, or were actually parted with at the sale, the petitioners should return to Schwartz, Dupee & Company a like number of shares of the same stock. Whether Clews & Company owned at the time, or had under their control in New York, these shares, or whether they expected to procure the same in the open market, does not appear from the testimony, nor can we conceive the fact to be material. For if Jamieson & Company really desired the shares they had an opportunity to acquire them when they were tendered, or of outbidding Clews & Company for them at the public sale. *The source of supply was no sort of concern to Jamieson & Company.* Whether Clews & Company would make good the loan was a risk assumed by Schwartz, Dupee & Company and personal to them. The loan of stock by a broker to his principal is in the strictest sense a *mutuum*, and is an every-day occurrence. Indeed, very respectable authorities have held

that one of the implied undertakings of a stock broker selling for a customer for the account is to furnish the stock.

See

Knowlton v. *Fitch*, 52 N. Y. 288.
White v. *Smith et al.*, 54 N. Y. 522.

In *Fisher* v. *Newark City Ice Co.*, 62 Fed. Rep. 569, a contract provided that plaintiff should cut, house and deliver on board defendant's vessels fifteen thousand tons of ice. Plaintiff tendered four thousand tons, which were refused, whereupon plaintiff abrogated the entire contract and sued for damages. The ice tendered by plaintiff was proved to have been the property of another with whom plaintiff had a contract. Concerning this fact the district judge observed, p. 573:

"It appears, however, that he (plaintiff) had four thousand tons on hand. *It is immaterial that another was interested in this. He had entire control of it.* The refusal to take it excused him from making further provisions to deliver."

In the Circuit Court of Appeals in the same case (there entitled *Newark City Ice Co.* v. *Fisher*), 76 Fed. Rep. 427, the ruling of the lower court was affirmed, the court remarking concerning the point above mentioned:

"Whether he (plaintiff) had it (the ice) in actual possession *or under control by contract with others is unimportant. In the latter contingency the nature of the contract does not concern the defendant.*"

But the loan of the stock by Schwartz, Dupee & Company to Clews & Company had this element which inured to the advantage of Jamieson & Company; under the terms of the loan the petitioners were required at a public sale fairly conducted, *to bid more than any other person would be willing to bid if the same shares were to be returned;* or the full market value of the stock *if like stock was to be substituted.*

No charge of actual fraud or unfairness is made or even hinted at by counsel for respondents; and all that was done by the petitioners and their representatives in, about or concerning the sale, appears in the testimony, and for the most part is documentary.

But even if the petitioners and their representatives had prevented fair and open bidding, the circumstance would not destroy the *fact* of sale nor the *prima facie* evidence of market value established by it, though it might be that very little controverting evidence would be required to overcome the *prima facie* presumption. To illustrate: If respondents had introduced testimony showing that the public sale of the stock in question had been unfairly conducted, and that the price realized, to-wit, $130 per share, did not represent free and untrammeled public bidding; and had further introduced testimony to the effect that $135 or $155 per share would be the fair market value of the stock, the latter testimony, we are frank to say would, under such circumstances, be altogether more credible; and so, doubtless, the master would have considered it. But there is not a syllable of testimony in the record impeaching the fairness of the sale or otherwise attempting to establish the value of the stock, unless it be the prices current on the Chicago Stock Exchange after its opening, November 5th. These prices so far from impugning the price realized at the sale, only confirm it.

The contention of Jamieson & Company, therefore, is narrowed to the strict legal questions: Was the sale one which the law recognizes as such? Did it establish a *prima facie* market value?

We have said that at the time of tender and prior thereto, the stock tendered was the property of Schwartz, Dupee & Company; but we further say that instantly such stock was

segregated and appropriated for the purposes of the tender, and actually tendered, *it became the property of Jamieson & Company.*

We will formulate the proposition as follows:

When Schwartz, Dupee & Company selected the particular certificates for 1,150 shares of stock, and appropriated them to the contract with Jamieson & Company, such stock became the property of Jamieson & Company, subject to the right of Schwartz, Dupee & Company;

1. *To rescind the sale, if they so elected, upon breach of the contract by Jamieson & Company.*

2. *To retain possession under a vendor's lien until paid the purchase price.*

In considering when the title passes on a sale of personal property care should be taken to distinguish those cases which are decided under the English Statute of Frauds and similar statutes in the United States.

Under the seventeenth section of the Statute of Frauds, title would not pass where there was no memorandum in writing, and no part of the price paid, until the goods or a part of them had been actually delivered *and accepted.* But that section is not in force in Illinois, and acceptance by the vendee is not a prerequisite in this State even when the contract is not in writing.

In the case at bar the contract was not for any specific shares of stock. They were unidentified. The sale was for 1,150 shares out of the total of the capital stock of the Diamond Match Company. Before title could pass the property must be specified, but when property is selected and appropriated to the contract, the contract then relates to that specific property and becomes a contract of sale for the identical shares so appropriated.

See the very instructive discussion of this question *Book II, Chapter 5 of Benjamin on Sales.*

The right of Schwartz, Dupee & Company to make the selection can not be questioned. They were bound to deliver; being bound to deliver they were bound to make the selection. From the nature of the transaction the right to make the selection could not rest in Jamieson & Company. If it did they might compel Schwartz, Dupee & Company to deliver any particular shares no matter by whom they were owned. This, of course, would be absurd. Necessarily the right to select the particular certificates must have rested in Schwartz, Dupee & Company.

See the following Illinois cases, as to when the title passes:

Rhea v. *Riner*, 21 Ill. 526.
Wade v. *Moffett et al.*, 21 Ill. 110.
Seckel v. *Scott*, 66 Ill. 106.
Barrow v. *Window*, 71 Ill. 214.
Owens v. *Weedman*, 82 Ill. 409.

Schwartz, Dupee & Company did not elect to rescind the sale. This is shown by every act of theirs and of petitioners. When the stock was resold at auction Jamieson & Company were notified that it would be resold for their account. If the sale had been rescinded there would have been no right to make such a sale. Jamieson & Company were further notified that in the meantime Clews & Company held the stock ready for delivery on payment of the purchase price.

That a resale is not a rescission, see:

Bayley v. *Findlay*, 82 Ill. 524.
Ullman v. *Kent*, 60 Ill. 271.
Saladin v. *Mitchell*, 45 Ill. 84.

Benjamin on Sales, Sec. 794.

Hayes v. *City of Nashville*, 80 Fed. Rep. 641.

Upon failure of Jamieson & Company to pay for the stock, the remedies of Schwartz, Dupee & Company were:

1. *To retain the stock as their own property and sue for damages. This would involve, as a matter of course, the rescission of the sale.*

2. *To store or safely keep the stock and sue for the full purchase price as an indebtedness owing by Jamieson & Company. This remedy would of course be based upon the contract as an existing obligation and would involve the retention of the stock for delivery upon demand.*

3. *Treating the contract as still in force and unrescinded, fully performed on their part, and with the obligation still existing on the part of Jamieson & Company to pay the full purchase price, Schwartz, Dupee & Company might sell the stock on account of Jamieson & Company,* TREATING IT AS THE PROPERTY OF JAMIESON & COMPANY, *such resale being authorized under an implied authority from Jamieson & Company; and the duty of Schwartz, Dupee & Company would be to make a fair sale and account to Jamieson & Company for the proceeds. They would have a right to appropriate a sufficient amount of the proceeds to pay the indebtedness of Jamieson & Company, but would be bound to account to Jamieson & Company for any overplus. If there should be a deficiency, it would be a deficiency on the original indebtedness, i. e., a balance due.*

The third course was the one pursued. The right of resale is universally recognized in the courts of England and America. In some decisions it is said the vendor acts as pledgee in making a resale; in others that he acts as agent of the vendee. Perhaps neither expression is exactly accurate, but either one for most purposes expresses nearly

25201

enough the relations of the parties. In any case the right must proceed on the theory that the property is the property of the *vendee;* that the vendor has authority from the vendee to sell it; that the vendor has a lien on the goods; that by virtue of his lien and the implied authority to sell he has a right to apply the proceeds to the payment of the indebtedness owing by the vendee; that in the meantime the vendee has a right to redeem the property, and until it is sold under the implied authority the vendor should preserve the property ready to be delivered.

In the event of sale, all that is required of the vendor is that the sale should be fair, and calculated to bring the fair market value.

Ullman v. *Kent*, 60 Ill. 271.

Now, in pursuing their remedy by resale, Schwartz, Dupee & Company were not bound to sell in their own names nor to advertise themselves, nor the persons employed by them, as acting for Jamieson & Company. They might have placed the stock in the hands of any broker to dispose of to the best advantage, and such broker would not be bound to disclose for whom he was acting.

Morris v. *Wibaux*, 159 Ill. 646.

As a matter of fact, Schwartz, Dupee & Company placed the stock in the hands of the petitioners to sell, who were even more interested than themselves in seeing that the stock should not be disposed of at a sacrifice. Schwartz, Dupee & Company, having originally furnished the stock for the benefit of the petitioners, had a right to look to petitioners to protect them from loss—to supply other stock in the place of that loaned.

Permit us to sum up the situation at the date of the sale. The property in the stock passed to Jamieson & Company on

August 31st. It still remained in them on September 22d. Schwartz, Dupee & Company had a right to retain it under their vendor's lien as against Jamieson & Company. It had been furnished by Schwartz, Dupee & Company for the benefit of the petitioners on August 31st, and they might then have called upon petitioners to furnish other like stock. At the sale the stock was produced by Schwartz, Dupee & Company for the purposes of the sale. It is not pretended that the stock would not then and there have been delivered to any purchaser, nor can it be assumed that Schwartz, Dupee & Company or Clews & Company, were not entirely responsible, or that they would not have been bound to the highest bidder to deliver the stock. Clews & Company were the highest bidders. They, by their agent employed by them, offered to give $130 per share for the stock, and it was declared also by their agent to be sold to the bidder employed by them. Let it be conceded that in making the sale they were agents, or sub-agents or pledgees of Jamieson & Company; that they made the sale to themselves through other agents employed by them. The stock was delivered by Schwartz, Dupee & Company to Clews & Company as agents.

Now let us suppose, after all this had been done, Clews & Company and Schwartz, Dupee & Company, ignoring the transaction, had, one or the other of them, commenced an action against Jamieson & Company for the full amount of the latter's indebtedness and had tendered such stock in court. Jamieson & Company unquestionably would have the right to show this transaction as amounting to a payment, as a credit upon the indebtedness to the full amount bid by Clews & Company. In other words, if Jamieson & Company found that the result was to their advantage they could hold Clews & Company to it.

25202

See, as a case very similar in principle *Fidelity Co.* v. *Roanoke Iron Co.*, 81 Fed. Rep. 449.

But it is not necessary for us to establish that this sale was absolutely binding upon Jamieson & Company, because the utmost they can claim is that it was *voidable*.

Mulvey v. *Gibbons*, 87 Ill. 367.

Gibbons v. *Hoag*, 95 Ill. 45.

Jenkins v. *Pierce*, 98 Ill. 646.

Cases are not infrequent where agents, trustees, pledgees or mortgagees bid in property sold under a power resting in themselves. It has never been held that such sales are *void*. All that can be claimed is, that if the principal chooses to avoid the sale on the ground that the agent was not authorized to purchase, he may do so, and the parties are then placed in *statu quo*. If the property were sold under a lien the lien revives. If at the time of the sale a credit was given for the amount bid, that credit, of course, is extinguished when the sale is avoided.

It is obvious that a sale can be ratified by the principal, and the cases are numerous which declare that where the person making the sale acts under a power coupled with an interest, it is the duty of the owner to repudiate the transaction promptly and seasonably, and if he fails to do so he will be held to have ratified the sale.

In the case of *Cunningham* v. *Macon & Brunswick R. R.*, 156 U. S. 400, the State of Georgia, as a trustee and indorser of railroad bonds, became the purchaser of the property at a sale made by it under a power of sale given in the mortgage. Junior incumbrancers claimed that the sale was void, and that the State, as trustee, could not purchase at its own sale. After premising that in Georgia the purchase by a trustee is not absolutely void, but merely voidable at the option of the *cestui que trust*, the court say, p. 424:

"Under these circumstances, conceding that the second series of bonds were secured by a second mortgage, their holders can not equitably be allowed to avoid the sale *without tendering reimbursement of the amount of the first mortgage* (etc.). * * * Instead of doing this, although nearly two years had elapsed between the sale and the filing of this bill, the complainants assert that their bonds are, in the contingency last stated, equal in rank of mortgage lien with those of the holders of the first series, and hence that they are entitled to an equal participation in the proceeds of the mortgaged property. * * * No offer to pay the amount of the first mortgage was made prior to the purchase of the property by the defendants, and their title can not be divested, even if such an offer were made."

In the case of *Collins* v. *Riggs*, 14 Wall. 491, a mortgagor attempted to treat a sale as voidable and offered to redeem by paying the amount *bid*. The syllabus clearly and accurately expresses the decision, and is as follows:

"To redeem property which has been sold under a mortgage (as is alleged irregularly) it is not sufficient to tender the amount of the sale. *The whole mortgage money must be tendered*, or if suit be brought, be paid into court."

In the case of *Strauss* v. *Labsap*, 59 Mo. App. 260, the question arises in a case similar to the case at bar. The action was to recover the balance of the purchase price as an existing indebtedness; that is, the difference between the contract price and the net amount realized upon a resale, at which resale the plaintiff purchased a portion of the goods. There being no evidence of the value of the goods other than that afforded by the resale it was urged that the plaintiff could recover only nominal damages.

While the Missouri Court of Appeals is not a court of last

resort it is a court of respectable authority, and the good sense of the decision is so apparent that we venture to quote from it.

"The argument in support of this assumes that the purchase by the plaintiffs is absolutely void. This is the vice in the argument, for the purchase is only voidable, and could only be avoided by the defendant on terms." * * *

"Now, it is true that the plaintiffs in conducting a resale acted as trustees or agents for the defendant, but their agency was coupled with an interest. *If they deemed it necessary to protect their interest they could buy the goods, but they held them subject to redemption, provided the defendant acted seasonably.* Upon being apprised of the purchase, it was the right of the defendant to have the goods purchased by the plaintiffs returned to him upon tender of the contract price, less the amount realized from a portion of the goods sold to third parties, or if the return of the goods was impossible, then, upon offer to pay the balance of the original purchase price, he would have been entitled to a credit for the actual market value of the goods purchased by plaintiffs, regardless of what they brought at the resale. This would be the rule if the defendants and the plaintiffs occupied the position of mortgagor and mortgagee and the suit was to recover the balance of the mortgage debt, and we see no reason why, in the adjustment of equities between these parties, the same rule would not prevail." * * * "The evidence of the plaintiffs tended to show that the sale was fairly conducted. The defendant offers no counter evidence and he did not offer to redeem although he was fully advised, prior to the trial, that the plaintiffs had purchased a portion of the goods."

The answer of Jamieson & Company, with reference to the auction sale, in substance, only states that there was

no sale as a matter of fact. It alleges that the petitioners borrowed from Schwartz, Dupee & Company, or some one else, certain certificates; that the petitioners employed some one to bid in their behalf; that no delivery of the stock to such person was made, and no money was paid by him. There is no allegation that respondents have repudiated or desire to repudiate the sale, or desire to redeem the property in the hands of the petitioners or of Schwartz, Dupee & Company. There is no allegation that respondents have ever been willing or have offered to perform their contract.

Their unwillingness to repudiate is easily accounted for. In the first place they would be obliged to offer to comply with their contract, and to pay the full purchase price; or they would assume the burden of showing that the price bid was less than its market value; or as a last resort they would be obliged to accept the price current on November 5th, as the value of the stock. So that it is apparent whichever position they should assume on repudiating the sale, would be worse than the position they now occupy.

The answer does challenge the fairness of the sale in one particular. It alleges that there was a *bona fide* bidder who offered $135 per share for 500 shares, but that appellants refused to accept this bid. The testimony shows that the whole of the 700 shares were offered in a lump. Nothing is shown to indicate that this was improper. There was a bid by the president of the Diamond Match Company, not for 500 shares, as alleged in the answer, but for 200 shares at $135 per share. This bid was not absolutely refused, but it was stated that if there were other bids for the rest of the stock in an amount sufficient, together with the bid for 200 shares, to exceed the bid which had then been made for all of the stock, such bids would be received, and an opportunity

was given for other bids to come in for the remainder of the stock.

Some point was made by counsel for Jamieson & Company that the stock was returned to Schwartz, Dupee & Company; that the petitioners paid no money to Schwartz, Dupee & Company. This payment of money would indeed have been an idle ceremony. If the petitioners had paid the money to Schwartz, Dupee & Company, they would have been bound immediately to repay the same to the petitioners. If petitioners had retained this identical stock they would have been bound to substitute other like stock to Schwartz, Dupee & Company. It really is no concern of the respondents that these reciprocal obligations were satisfied between petitioners and Schwartz, Dupee & Company by the return of the identical stock and the omission to exchange checks.

See *Wald* v. *Rees*, 48 Ill. 428.
Jacobs v. *Turpin*, 83 Ill. 424.

IV.

THIS SUIT WAS PROPERLY BROUGHT, AND PETITIONERS CAN HAVE ADEQUATE RELIEF ONLY IN A COURT OF EQUITY, AND FOR THE FOLLOWING REASONS:

1. BECAUSE THE FUND IN THE POSSESSION OF THE MANAGERS OF THE STOCK EXCHANGE IS A TRUST FUND, WHICH EQUITY IS ASKED TO ADMINISTER.

2. BECAUSE IT IS DOUBTFUL IF AN ACTION AT LAW WOULD LIE IN THE NAME OF THE PETITIONERS AGAINST THE STOCK EXCHANGE.

3. BECAUSE IF THE PETITIONERS COULD SUE THE STOCK EXCHANGE AT LAW, THE REMEDY WOULD NOT BE AS COMPLETE NOR AS EFFECTUAL AS THE RELIEF IN EQUITY.

4. BECAUSE THE CONTRACT OF JAMIESON & COMPANY WAS

A SINGLE CONTRACT FOR THE PURCHASE FROM SCHWARTZ, DUPEE & COMPANY OF 1150 SHARES IN WHICH THE PETITIONERS WERE INTERESTED ONLY TO THE EXTENT OF 700 SHARES.

1. *The deposit in trust.*

In argument upon the demurrer it was contended by counsel for respondents that the managers of the stock exchange were simply stakeholders, and that petitioners were attempting to garnish the stock exchange by a bill in equity. The analogy to garnishment is not even close enough to be specious. The mere fact of garnishment is an acknowledgment that there is no privity between the plaintiff and the garnishee, nor any right to, or lien upon particular property in the garnishee's possession. The very object of a garnishment is to acquire a lien by operation of law. Here the petitioners assert a lien on a particular fund, and in effect are seeking to foreclose it. The managers of the stock exchange were, in a conventional sense, stakeholders, but we think on final analysis it will be found that nearly every trustee of money, where there are two or more *cestuis que trust*, will be found to be a mere stakeholder.

The deposit of money by Schwartz, Dupee & Company and Jamieson & Company with the stock exchange created a trust simply because it *was* a deposit—a *depositum*—a bailment.

"Bailment, from the French *bailler*, to deliver, is a *delivery of goods in trust* upon a contract, expressed or implied, that the trust shall be faithfully executed on the part of the bailee." 2 Black. Com. 452.

The definition of Sir William Jones is to like effect.

See

Jones on Bailments, 117.

See also

Story on Bailments, Ch. 1 Par. 2.

25205

A deposit, or *depositum*, is defined by Judge Story as

"A bailment of goods to be kept by the bailee *without reward*, and delivered according to the object or purpose *of the original trust*."

One of the definitions of Rapalje is:

"Money lodged with a person as an earnest or security for the performance of some contract."

See

Law Dictionary, tit. "Deposit."

If a depositary of a chattel repudiates the trust and converts the chattel to his own use, or disposes of it, the claimant has choice of a variety of remedies. He is not bound to proceed in equity under the original contract of bailment, because the depositary himself has, by his acts, repudiated the contract. If the specific chattel is still in the possession of the bailee, the bailor may replevy it. If the bailee has destroyed or disposed of the chattel he is guilty of a tort, and like every tort-feasor, may be compelled to respond in damages; or, by a fiction of law, the claimant may count upon an implied contract and sue in assumpsit. In other words, the claimant may repudiate the original contract and the original relationship and assume the relationship of creditor and debtor, and is entitled to all legal remedies incident thereto. But is he *compelled* to abandon the original contract of bailment and assume the attitude of a simple creditor? Would it not be an anomaly to declare that because one party to a contract has repudiated the contract, therefore all parties must be presumed to have repudiated it? Can the wrongful act of a bailee transmute him into a simple debtor, notwithstanding the bailor prefers still to regard him in the former relationship? It seems to us that the very statement of the proposition contains its own refutation.

See

Goodenow v. *Snyder*, 3 G. Green, Ia. 599.
Coster v. *Murray*, 5 Johns. Ch. 532.
Kane v. *Bloodgood*, 7 Johns. Ch. 90.
McCrea v. *Purmort*, 16 Wend. 460.

The doctrine announced in the foregoing cases is not obsolete, for as recently as May, 1891, was decided the case of *Gutch* v. *Fosdick*, by one of the most respectable of our State courts (48 N. J. Eq. 353). It is not necessary for us to declare our concurrence in all the views of the court, for, to speak frankly, it seems to us that where money is deposited as a bailment, if subsequently, by agreement of the parties, the bailee is to pay interest thereon, the relationship is changed to creditor and debtor, and the reasoning of the chancellor in *Gutch* v. *Fosdick*, to take the transaction out of this category, strikes us as somewhat refined.

In *Levi* v. *Evans*, 6 C. C. A. 500 (a case determined in this circuit), the principle is announced that to establish and enforce an alleged trust, and to secure an accounting for a breach thereof, is a familiar subject of equitable jurisdiction. And further, that a trust in respect to money or other personal property may arise or be created upon the same facts and circumstances which would give rise to a trust in real estate, except that in respect to the latter the trust must be manifested by writing.

See also

McCampbell v. *Brown*, 48 Fed. Rep. 795.
National Park Bank v. *Halle*, 30 Ill. App. 17.
Warner v. *Martin*, 11 How. (U. S.), 209.

The rule is stated by Mr. Pomeroy in his work on Equity Jurisprudence, section 158, as follows:

"A court of equity will always by its decree declare the

25206

rights, interests, or estate of a *cestui que trust*, and will compel the trustee to do all the specific acts required of him by the terms of the trust. It often happens that the final relief to be obtained by the *cestui que trust* consists in the recovery of money. This remedy the courts of equity will always decree when necessary, whether it is confined to the payment of a single specific sum, or involves an accounting by the trustee for all that he has done in pursuance of the trust, and a distribution of the trust moneys among all the beneficiaries who are entitled to share therein."

The moneys deposited by Schwartz, Dupee & Company and Jamieson & Company with the managers of the stock exchange were to secure the mutual performance of their contract as set forth in the bill, with the understanding and agreement that said stock exchange was to account and pay over to the party entitled to it so much of said fund as might appear to be their due when the contract should have been executed.

It seems to us clear that thereupon said stock exchange became a trustee, and that the funds so deposited were trust funds, and that the claimant of said funds would have the right to sue said stock exchange for a breach of trust in equity if it failed or refused to account for such funds, even conceding that such claimant might have his remedy at law for money had and received.

It goes without saying that the stock exchange, if so disposed, could have brought its original bill of interpleader against Henry Clews & Company and Jamieson & Company, setting forth that it disclaimed any interest in the fund; that the parties defendant were claimants thereto, and compel the said parties to litigate their right to the fund in a court of equity, *whether their claims were legal or equitable.*

See

Bailey v. *Insurance Co.*, 114 Mass. 177.

2. *Could petitioners sue at law to recover the funds in the hands of the stock exchange?*

The contract of sale was between Schwartz, Dupee & Company and Jamieson & Company, and the trust fund was deposited by them. The undertaking of the stock exchange was with the above named parties. The doctrine that an undisclosed principal is bound by the acts of his agent would hardly apply to the stock exchange, which was acting, not as an agent of either party, but as a trustee for both.

The case of *National Bank* v. *Insurance Company*, 104 U. S. 54, is in point and the analogy is complete. In that case Dillon, the agent of the insurance company, deposited its money in the bank, and the bank had notice that the money was the money of the company.

It was objected that the remedy of the company to recover the fund was at law and not in equity. The court, however, says:

"But the contract created by the dealings in a bank account is between the depositor and the bank alone, without reference to the beneficial ownership of the moneys deposited. No one can sue at law for a breach of that contract except the parties to it. There was no privity created by it * * * between the bank and the insurance company. * * * No action at law upon the account could be maintained by the insurance company."

Certainly, if the insurance company could not sue the bank at law to recover money received by the bank with knowledge of its ownership, how can Clews & Company sue the stock exchange at law? The stock exchange did not even

know that any one but the depositors had any interest in the fund.

The case is also valuable as an authority for the point that the money in the hands of Dillon was impressed with a trust in favor of the insurance company, which would give a court of equity jurisdiction on that ground, if no other, and the court cites approvingly the case of *Dillon* v. *Ins. Co.*, 44 Md. 386, to this very point.

National Bank v. *Insurance Company* is likewise pertinent to a point already discussed. The trial judge, in the case at bar, by no means determining that, in conscience, the petitioners were not entitled to recover, dismissed their bill for want of privity—the very reason given by the Supreme Court why equity should take jurisdiction.

3. *The legal remedy, if existing, would be neither complete nor as effectual as the relief in equity.*

A judgment at law against the stock exchange would still leave the contest, as to the right to the fund, open for future litigation between petitioners and Jamieson & Company, or between petitioners and Schwartz, Dupee & Company.

In *Boyce's Ex'rs* v. *Grundy*, 3 Peters, 215, it is said:

"It is not enough that there is a remedy at law; it must be plain and adequate; or, in other words, *as practical and as efficient* to the ends of justice in its prompt administration as the remedy in equity."

In *Oelrichs* v. *Spain*, 15 Wall. 211, it is said:

"The direct proceeding in equity will save time, expense and a multiplicity of suits, and settle finally the rights of all concerned in one litigation. Besides there is an element of trust in the case which, wherever it exists, always confers jurisdiction in equity."

The answer of the managers of the stock exchange admits that the money deposited with it is held in trust as

security for the performance of the obligations of the parties to the contract of August 3d. The stock exchange has no right to appropriate the money to any other purpose. It can not use it as its own; it can not even return it to the parties without determining which of them, under the terms of the contract, is entitled to it.

4. *Severance of entire contract.*

Leaving out of view, however, the question of trust, how could petitioners have brought an action at law against Jamieson & Company? The contract, as made by Jamieson & Company, was a single contract for the purchase of 1,150 shares. If petitioners had attempted to split up that contract, Jamieson & Company would have objected that they were being subjected to several suits, whereas their liability ought to be determined in a single action. If petitioners had attempted to sue in the name of Schwartz, Dupee & Company, either they or Jamieson & Company might object that the petitioners had no right to use the name of Schwartz, Dupee & Company in a suit upon a contract in which the petitioners had only a partial interest. The case would be strictly analogous to that of an assignment of part of a cause of action, in which the assignor is treated as a trustee. In such cases there can be no remedy at law.

Phillips v. *Edsall*, 127 Ill. 535.

Chapman v. *Shattuck*, 3 Gilman (Ill.), 49.

Of course, if equity assumes jurisdiction for the purpose of administering the trust, or for any other purpose, it will retain it for all purposes.

II.

THE QUESTION OF GAMBLING.

The respondents in their answer did not seek to impeach the contract of August 3rd on the ground that it was wagering or gambling; no testimony was introduced before the master remotely touching such an issue; and it was only in response to the innuendoes of counsel in oral argument that the master found affirmatively that the transaction was not gambling. This finding of the master was, in effect, affirmed by the trial court when his honor, Judge Grosscup, speaking of the contract here sued upon, declared:

"*There can be no question* that there came into existence by the transaction stated a contract, whereby, primarily between Schwartz, Dupee & Company and the defendants, the latter were *obliged* to purchase of the former, and the former were *obliged* to sell to the latter, during the month, 700 shares of this stock at the price of $222 per share."

Whether the transaction *on its face* disclosed an intention of the parties *necessarily* unlawful, and rendering the contract between them gambling *per se*—this question, perhaps, was still in the case, and the court of appeals, therefore, would, of its own motion, be justified in taking judicial notice of it.

We have seen that a sale for future delivery on the Chicago Stock Exchange must, under the rules of that institution, go through the clearing house. We have seen that the transaction out of which this controversy arose proceeded step by step through the usual and ordinary routine, resulting in the contract of August 3rd, upon which this suit was brought. *There is not a circumstance in the transaction out of the ordinary, save only as the methods peculiar to the Chicago Stock Exchange have made it so.* Nevertheless, the

Circuit Court of Appeals has declared the transaction to be a gambling transaction. The decision of the Court of Appeals is the most far-reaching on this important subject in the whole body of the law. *Its effect is to make every one, availing himself of the machinery of a stock exchange to effect sales for future delivery, a gambler in spite of himself and regardless of his intentions.*

That a stock exchange offers unusual facilities for *speculation* in shares of corporate stocks may be admitted. But the law does not prohibit speculation, however much individual judges may reprobate it. A man has as much right to exercise his judgment as to the future values of corporate stocks and trade in them accordingly, as the merchant has to order his winter stock of dry goods in the middle of July, or a contractor to agree with the government to supply beef for the Indians, himself not owning a neat's foot. Sporadic legislation against contracts of sale for future delivery has, on trial, proved more harmful than healthful, and in every instance, so far as we are aware, has been repealed.

In common parlance, the man who agrees to buy shares of stock as an investment, to put away in his strong box to await the development of the enterprise represented by them, is a conservative business man, particularly if, *in the long run*, his judgment is vindicated; while the man who agrees to buy and sell, hoping to realize a small profit on the turn of the market—even before he is called upon to perform, perhaps—is a gambler. The law makes no such distinction. It does not predicate a principle on the mere lapse of time. Both are speculators, neither is a gambler. Indeed, there is more logic than casuistry in the argument which reduces all enterprise to speculation and, as it were, to gambling; and the common law, as we know,

25203

upheld wagers. But there is an ethical as well as legal distinction between lawful and unlawful speculation—between business and gambling. In case of a wager as to whether a thing will or will not happen, the loser has nothing whatever to show for his loss; whereas the man who has agreed to buy a thing at a future time at a price greater, as the event shows, than he could then purchase it, obtains the thing contracted for; and the man who agrees to sell a thing at a future time for less than he might then obtain in the market, receives the price he bargained for.

As said by ANGEW, J., in *Kirkpatrick* v. *Bonsall*, 72 Pa. St. 158:

"We must not confound gambling, whether it be in corporation stocks or merchandise, with what is commonly termed speculation. Merchants speculate upon the future prices of that in which they deal, and buy and sell accordingly. In other words they think of and weigh, that is, speculate upon, the probabilities of the coming market, and act upon this lookout into the future, in their business transactions; and in this they often exhibit high mental grasp, and great knowledge of business, and of the affairs of the world. Their speculations display talent and forecast, but they act upon their conclusions and buy or sell in a *bona fide* way. Such speculation can not be denounced. * * * *The illegal purpose is therefore a fact falling within the province of the jury*, and when found by them, brings the contract under the ban of the law."

And the language of THOMPSON, C. J., in *Smith* v. *Bouvier*, 70 Pa. St., p. 232, is equally to the point:

"*Bona fide* time contracts about stocks and other personal property seem from custom to be necessary in our country, and although such transaction may be greatly affected by the rise and fall of the market, yet they are not for this rea-

son obnoxious to the objections made to the transactions we are now considering; for in such case the losing party has something for his money, but the losing gambler nothing.

"The doctrine contended for here would place all stock contracts on the same footing, if making profits may be deduced as the motive of the parties buying and selling. When stocks are bought and sold, to be actually delivered, it is a very different case from that of Brua's appeal, *supra*, where the transaction was found to have been simply a bet or wager. In the one case the transaction is within the scope of a business everywhere recognized as legitimate; in the other it is a gambling transaction, which courts will never exert their power to enforce, if not entirely executed by the parties."

In *Porter* v. *Viets*, Fed. Cas., 11,291 (Illinois, U. S. Circuit Ct.), Judge DRUMMOND went far in excluding evidence of a collateral understanding, but his definition of a wagering contract is clear and forcible.

V. sold corn to P. at forty-eight cents, for delivery June 30; when that time came, corn had risen to sixty-three cents; V. refused to deliver. Suit brought for non-delivery. V. set up that at time of making contract (April) he had not the corn to deliver, nor had he entered into any contract to purchase it to fulfill his contract with P.; nor had he any expectation of obtaining corn; that it was not intended by parties that corn should be delivered, but that it was a contract for the payment of the difference between price mentioned and its market value at time of delivery; that it was nothing more than a wager between parties as to price of corn at the time fixed on, and that the contract was only a cover to the real intent of the parties, which was merely a bet, and nothing more.

DRUMMOND, J.: "Whatever doubt may have formerly

25210

existed, it must be now considered the settled law, both in England and in this country, that the mere fact that a man *may not have in his possession, and has not attempted to acquire possession of, a particular commodity, which he undertakes to sell, deliverable at a future time, will not render illegal a contract made by him to sell and deliver the article.* He is bound by his contract, nevertheless, and must deliver the property, or be subject to the consequences of a non-delivery. It is an agreement to sell and deliver at a future day, and to release a party from such a contract, because he did not at the time have the property, would interfere too much with commercial contracts. * * * If corn had fallen fifteen cents a bushel, Viets would have insisted on P. & Co. carrying out *their* contract! Both parties entered into it with full knowledge of the risk they ran, and the court will not help one of them because his judgment was unsound, or because something occurred that he did not foresee. * * * It is not necessary to decide in this case whether a wager between these parties as to the price of corn at a particular time was valid or not. The defendant now insists that he did not make such a contract as is presented to the court by the pleadings, but that it was an agreement to pay the difference between the price of corn as stated, and the price at a future day; in other words, he wishes to prove what the law determines is ordinarily the measure of damages for the non-performance of his contract. The rule is well settled that when two men make a contract, and reduce it to writing, and sign it, that is the contract between them. It can not be shown verbally that something different was intended at the time from what appears in the writing. * * * Here no fraud is pretended; the contract is free from doubt or ambiguity. It is to deliver a certain quantity of corn at a certain time for a certain price, all set forth in writing.

The defendant says that he wishes to show that the intention of the parties at the time was to make a wager as to the price of corn during the last half of June, and that the amount of the wager and the party who was to win or lose was to depend upon the market price of corn. *Now it may be true that the result is precisely the same—that is, the one party loses and the other party gains the same amount as in a wager. So it is in any case of this kind when a party does not perform his contract.* But that circumstance does not make the CONTRACT the same. In the case of a wager on the *price*, when a man pays the '*difference*,' he performs his *contract*, but he does not fulfill *this* contract by paying the difference. HE MEETS THE PENALTY THE LAW IMPOSES FOR A BREACH OF IT. Here this defendant wishes to establish orally that another contract was made at the time, not in writing, and which he alleges was illegal, in order to make out the illegality of the written contract. This can not be done. No doubt all contracts which are illegal may be attacked, but no case has been shown which authorizes a party to prove verbally, that another contract (in itself illegal) existed, *and so get rid of a written contract on its face unexceptionable.*"

In *Hentz* v. *Jewell*, 20 Fed. Rep. 593 (Miss.), HILL, J., said: "If, according to the contract between the parties when made, EITHER MAY DEMAND A STRICT COMPLIANCE WHEN THE TIME FOR PERFORMANCE COMES, THEN THE CONTRACT IS VALID, EVEN THOUGH ONE OF THE PARTIES MAY SECRETLY INTEND AT THE TIME NOT TO COMPLY, IF SUCH NON-PERFORMANCE IS NOT AGREED TO BY THE OTHER CONTRACTING PARTY AT THE TIME OF CONTRACT. In other words, to render the contract invalid, there must *at the time of its creation*, be a mutual understanding between the parties that no delivery is to be made, but only the difference in prices paid."

The *syllabi* in *Clarke* v. *Foss et al.*, 5 Fed. Cas. No. 2852

(7 Biss. 540), give a categorical statement of the propositions we contend for.

The *syllabi* with their annotations read as follows:

1. A contract for the delivery at a future time of personal property, *which the seller has not on hand when the contract is made, nor any means of getting it,* is not void for illegality.

2. *The secret intention of one of the contracting parties not to fulfill his contract, uncommunicated to the other, is not enough to make the transaction illegal.*

(Approved in *Ward* v. *Vosburgh*, 31 Fed. 14.)

3. The intent that such a transaction should be a mere betting on the market, without any expectation of actual performance *must be mutual and constitute an integral part of the contract in order to render it invalid.*

(Approved in *Ward* v. *Vosburgh*, 31 Fed. 14.)

4. *If the contracts were valid in their inception* and not tainted with any gambling intent or device, *a subsequent mutual settlement by the parties by payment of differences,* instead of by actual delivery, *can not make them void for illegality.*

(Approved and applied in *Gilbert* v. *Gaugar*, Fed. Cas. No. 5412; *Ward* v. *Vosburgh*, 31 Fed. 15, 16; cited in *Third Nat. Bank* v. *Harrison*, 10 Fed. 250; *Jackson* v. *Foote*, 12 Fed. 41; *Hentz* v. *Jewell*, 20 Fed. 593.)

The case of *Clark* v. *Foss et al.* arose out of contracts made in Illinois and the case was decided according to the law of that State.

One of the leading authorities in the United States is *Sawyer, Wallace & Co.* v. *Taggart*, 77 Ky., p. 727.

The *syllabi* in this case read as follows:

1. CONTRACTS FOR THE SALE OF GOODS TO BE DELIVERED AT A FUTURE DAY ARE NOT INVALIDATED BY THE CIRCUMSTANCE

THAT AT THE TIME OF MAKING THE CONTRACT, THE PURCHASER INTENDS TO RESELL BEFORE THE TIME APPOINTED FOR THE DELIVERY.

2. CONTRACTS FOR FUTURE DELIVERY, ENTERED INTO WITHOUT ANY MUTUAL AGREEMENT, TACIT OR EXPRESS, THAT THEY ARE NOT TO BE PERFORMED BY DELIVERY OF THE GOODS AND PAYMENT OF THE PRICE, ARE VALID, AND NO SUBSEQUENT AGREEMENT TO SETTLE THEM BY THE PAYMENT OF DIFFERENCES CAN RENDER THEM INVALID.

3. THE FACT THAT THE PURCHASER FOR FUTURE DELIVERY INTENDS NOT TO RECEIVE AND PAY FOR THE GOODS, BUT TO RESELL THEM BEFORE THE DATE OF THE DELIVERY, FURNISHES NO GROUND FOR HOLDING THAT IT WAS TACITLY UNDERSTOOD THE CONTRACT WAS NOT TO BE PERFORMED, AND WAS TO BE SETTLED BY THE PAYMENT OF DIFFERENCES.

4. A purchaser of goods for future delivery—through a commission merchant by depositing a margin—who orders a resale before the contract time for delivery, is liable for all losses thereby sustained.

5. A GAMING CONTRACT IS ONE IN WHICH IT IS AGREED OR UNDERSTOOD IN THE BEGINNING THAT THE THING DEALT FOR IS NOT INTENDED TO BE DELIVERED, BUT THAT THE PARTIES ARE TO SETTLE THEIR MUTUAL WAGES ON THE PRICE, BY PAYING THE DIFFERENCE BETWEEN SALES AT DIFFERENT TIMES.

The contract under consideration in the case of *Sawyer, Wallace & Co.* v. *Taggart* was made on the New York Cotton Exchange.

Say the court:

"Sales for future delivery have long been regarded and held to be indispensable in modern commerce, and as long as they continue to be held valid, one who buys for future delivery has as much right to sell as any other person, and there can not, *in the very nature of things, be any valid reason*

why one who buys for future delivery may not resolve, before making the purchase, that he will resell before the day of delivery, and especially when, by the rules of trade and the terms of his contract, the person to whom he sells will be bound to receive the goods from the original seller, and pay him the contract price. * * *

"But if A, desiring to engage in trade, enters into a contract with B for the purchase of an article for future delivery and becomes bound to receive and pay for it, that is a real transaction, and is valid whether made in the country or on 'Change. What difference, then, is made in the nature or character of the transaction if, instead of intending to receive the article himself and pay for it, he intends to resell it, and thereby procure another to receive and pay for it in his stead?

"*The material matter is that the contract shall be such that its performance can be enforced. If, in the case put, A does not, by reselling, procure another to perform the contract for him, he is bound to perform it himself.* * * *

"It is next contended that such understanding (to gamble) is shown by the fact that in the whole course of dealing between Sawyer, Wallace & Co., and Hamiltons, extending over a period of about two years, and amounting in the aggregate to several hundred thousand dollars, no goods were ever actually received by either on account of any of said transactions.

"This argument would have much force but for the fact that all these transactions were had with the same intention to resell and the further fact that sales were actually made in all instances, just as in those we are considering. If one such transaction might be legally had, then many made with the same object in view would be equally lawful. * * *

"BUT COUNSEL CONTEND THAT THE RULES OF THE NEW YORK EXCHANGE ARE SO FRAMED AND THE COURSE OF DEALING THERE IS SUCH THAT DELIVERIES CAN NOT BE ENFORCED, AND THAT THIS PROVES OR TENDS TO PROVE THAT THE PARTIES UNDERSTOOD THESE CONTRACTS WERE NOT TO BE ENFORCED. RULES 4, 6 AND 8 OF THE COTTON EXCHANGE ARE INDICATED AS ESTABLISHING THIS VIEW.

"Rule 4 provides that either party to a contract may close or cancel it upon notice in writing to the opposite party at any time before notice of delivery. But how? The rule goes on to provide that 'the party to whom notice is given has the option either to make settlement (*i e.*, to pay or receive the difference), or to receive a satisfactory contract made equal to that held by him.'

"Upon such notice being given, the party receiving it *is not compelled* to accept settlement by payment of differences. He has, by the express language of the rule, the 'option' to demand another contract equal to that held by him. The only effect of the rule is, that if the party giving the notice can procure a party satisfactory to him to whom notice has been given to take his place and perform the contract, the contract of such person must be accepted in lieu of the original contract. This is but a reasonable regulation which, while it does not deprive the party receiving the notice of the right to demand the thing purchased, or to deliver and receive payment for the thing sold, may be, and doubtless is, of great practical value and importance to trade, and in no way tends to facilitate fictitious trading or gambling on market prices.

"Practically the rule amounts to this, that the party to whom notice is given must pay, or accept payment of the difference or accept a satisfactory person in the room and

stead of the party giving the notice, and discharge him and look to his substitute for performance of the contract.

"Rule 6 relates to margins, and we do not perceive that it has any bearing upon the question in this case.

"Rule 8 relates to settlements when there has been default in delivering or receiving cotton due on a contract. It provides that in such cases the seller making default shall settle at one quarter of a cent per pound above the average quotations for spot cotton of the day of delivery, and that a buyer making default shall settle at the average quotations for spot cotton of the day following, with the addition of one quarter of one cent per pound in favor of the seller; and it also provides that 'no defaulting party can claim settlement under this rule, except upon evidence that the default was unintentional, and not premeditated.'

"Liability for such a penalty for default, and a provision for this summary mode of making settlements in such cases, would seem to be a sufficient and salutary guaranty for the performance of contracts, and instead of affording facilities for, or furnishing evidence of, gambling on the turn of prices, seems well calculated to insure that good faith and promptness so indispensable in commercial transactions.

"*Without noticing other provisions of the rules, it may be remarked that they seem to provide for real and not fictitious trade; that they provide against unreal transactions; and that so large a portion of the real business in the great cities is done on 'Change as to wholly forbid the conclusion that all contracts made on them are unlawful; and unless such conclusions could be reached, the contract involved here must be held to have been valid and lawful.*"

To the same effect is the holding of Judge COOLEY in *Gregory* v. *Wendell*, 40 Mich. 432.

See also, *Hatch* v. *Douglass*, 48 Conn. 116.

The doctrine announced in *Bibb* v. *Allen*, 149 U. S. 481, is in line with the foregoing authorities. The contract involved was also made on the New York Cotton Exchange, the rules and usages of which institution were held to have been incorporated in the contract.

Say the court:

"In entering into their arrangement, it is shown by the correspondence, and by other testimony in the case, that there was no agreement or understanding between the plaintiffs and defendants that the cotton sold for future delivery *was not in fact* to be actually delivered."

After a general statement that an agent can not recover, being *particeps criminis* in an illegal transaction, the court add:

"But the facts of this case do not bring the transactions in question within the operation of that principle, for the evidence set out in the bill of exceptions *fails to show* that either party to the transactions intended the same as wagering or gambling speculations. On the contrary, the undisputed testimony establishes that the sales were not wagers, but that the cotton was to be actually delivered at the time agreed upon. Bibb's own statement of the transactions does not disclose the fact that they were intended, even on his part, as gambling or wagering speculations. He certainly never disclosed to the plaintiffs, as his brokers, either in their correspondence or in their verbal communications, that he did not intend to deliver the cotton sold through them for future delivery. *In addition to this it is shown that the rules and regulations of the New York Cotton Exchange recognized no contracts except for the sale and purchase of cotton to be actually delivered. These rules and regulations impose upon the seller the obligation to deliver the cotton sold, and upon the purchaser the*

obligation to receive it, except in certain specified cases, which have no application to the present case.

"It is well settled that contracts for the future delivery of merchandise or tangible property are not void, whether such property is in existence in the hands of the seller, or to be subsequently acquired. 2 Kent's Com. 468, and authorities cited in notes; Benjamin on Sales, Am. Ed., 81, 82. *It is further well settled that the burden of proof is upon the party who seeks to impeach such transactions by showing affirmatively their illegality. Rountree* v. *Smith*, 108 U. S. 269; *Dykers* v. *Townsend*, 24 N. Y. 57; *Irwin* v. *Williar*, 110 U. S. 499, 507, 508. In this latter case (*Irwin* v. *Williar*) the trial court charged the jury that 'the burden of showing that the parties were carrying on a wagering business, and were not engaged in legitimate trade or speculation, rests upon the defendant. On their face these transactions are legal, *and the law does not, in the absence of proof, presume that the parties are gambling.* A person may make a contract for the sale of personal property for future delivery which he has not got. Merchants and traders often do this. A contract for the sale of personal property which the vendor does not own or possess, but expects to obtain by purchase or otherwise, is binding if an actual transfer of property is contemplated. A transaction which on its face is legitimate can not be held void as a wagering contract by showing that one party only so understood, and meant it to be. *The proof must go further, and show that this understanding was mutual; that both parties so understood the transaction.*'" * * *

And the court adds, p. 493:

"This court approved that charge as a correct statement of the law upon the subject of what constitutes a wagering contract. It is directly in point here, for the evidence *fails to show* not only that Bibb & Company intended it as a wager-

ing contract, but it *fails to show* also that the plaintiffs so understood it. The testimony establishes that the plaintiffs did not, in fact, so understand it.

"It further appears that in the memorandum, or 'slip contracts' of sale actually made by the plaintiffs for the account of Bibb & Company, the sales were described as made 'subject to the rules and regulations of the New York Cotton Exchange.' Under these circumstances we are of the opinion that the testimony *fails to establish* that the contracts in question were wagering transactions, and therefore void. The testimony is so clear to the contrary that the court below, under the settled rules of this court, was certainly justifiable in not submitting that question to the jury; for if it had been submitted, and the jury found that the contracts were wagers, it would have been the duty of the court to set aside their verdict."

The rules of the New York Cotton Exchange are not set out in the opinion in *Bibb* v. *Allen*, but if they may be presumed to be the same as set out in the opinion in *Sawyer, Wallace & Company* v. *Taggart, they permit a greater latitude for settlement according to differences than the rules of the Chicago Stock Exchange.*

A recently hotly contested case through the Illinois courts growing out of a series of transactions on the Chicago Board of Trade, determines many questions involved in this case and incidentally touches upon a rule of the board of trade, which, in its operation, is not unlike the clearing house of the stock exchange.

The case is *Warren & Co.* v. *Scanlon*, to be found in 59 Ill. App. 138, 68 Ill. App. 213 and 169 Ill. 142.

The defendant pleaded the statute against options; also gambling. The verdict of the jury on the first trial was in favor of the defendant and plaintiff appealed. The judgment

of the lower court was reversed because the facts did not justify the inference of the jury that the intention of the parties was to settle according to differences in price.

In the Appellate Court the appellee urged (59 Ill. App. 141) that no delivery of grain was shown except in the "ringing up" process described in *Irwin* v. *Williar*, 110 U. S. 399, and claimed that no rule of the board of trade could bind appellee to accept such delivery unless he had actual, as opposed to presumptive, knowledge of the existence of such a rule.

Further claiming that the rule itself was illegal and void and that "*if business is transacted under it, the board of trade itself is nothing but a gigantic 'bucket shop.'*"

Judge CARTWRIGHT delivered the opinion of the court but did not pass upon this point.

When the case again came before the Appellate Court on an appeal by the defendant (verdict having gone against him), practically the same points were urged, and Judge LACEY, delivering the opinion of the court, says, 68 Ill. App. 217:

"The first instruction ignores the fact (as is claimed) *that the contracts themselves on the board of trade leave an option open to either party to receive or not to receive, to deliver or not to deliver the grain.* We do not understand that the proof tended to show any such option with the board of trade.

According to the rules of the board of trade a purchaser of grain could make sale of as much grain as he had purchased, and the member of the board of trade making the sale or purchase would take the burden upon himself to see that the wheat when delivered on the purchase should be immediately turned over on the sale. He simply took this responsibility as the agent of his employer, his employer not being able to deal on the board of trade himself. *We do*

not think such a rule could be twisted into an optional sale by any fair reasoning. If so, transactions under the rules of the board of trade would be in their nature per se gambling transactions, which we do not understand that any court has ever holden."

The judgment of the trial court being approved, the defendant prosecuted his appeal to the Supreme Court, 169 Ill. 142. Mr. Justice Carter delivering the opinion of the court and re-affirming the judgment.

Tr. p. 149.

Of the opinion of the Circuit Court of Appeals in this case our criticisms are both general and specific.

GENERAL CRITICISMS.

1. The opinion affects to discover from the evidence, combined with the rules of the stock exchange, an *intention* of the parties to gamble. We respectfully insist that the *intention* of the parties in transactions of this kind *is a question of fact*, to be pleaded as a fact, and so found by a jury, or a master, or the trial court.

Bartlett v. *Smith*, 13 F. R. 263.

In an article in the Central Law Journal by Mr. Elliott, of Indianapolis (Vol. 22, p. 271), it is said:

"Intent and motive are two different things, the motive being that which causes or induces the act, and the intent being the purpose for which it is done; but the two words are often used interchangeably in the authorities, and the distinction, while proper, is not always a necessary one. * * * Intention or motive being a state of mind internal and invisible except through outward manifestations, its existence must usually be a matter of inference or presumption from the outward or visible acts and manifestations,

which serve to indicate more or less clearly and conclusively the particular intention. * * * Formerly, therefore, when parties were not competent witnesses, the usual, and in general, the only way of proving intent was by evidence of such conduct, or such outward acts and circumstances as tended directly, or indirectly, to show the particular intent. But where parties are allowed to testify, it is now generally held that the intention is, in a sense, a fact to be proved as any other fact, and that, when material, a party may testify as to his own intention. This seems in accordance with common sense, for no one can tell better what an act was intended to accomplish, or what motive prompted it than the person who did the act. * * *

The inference to be drawn from the acts and circumstances is usually one of fact for the jury to determine; but there are some instances where, as experience has shown, there can be but one reasonable inference, which *of necessity* arises from the facts as they stand otherwise unexplained. *In such cases the law itself fixes and determines the inference, which is called a presumption of law.*"

The learned author then proceeds to give instances of legal presumption, as follows:

"Thus, from the uttering of a forged document, the law presumes an intent to defraud the person who would naturally be affected thereby. So where one sets fire to a building, the presumption is that he intended to destroy it, and also that he intended to injure the owner. So, also, where a baker delivers adulterated bread to a public asylum, the presumption is that he intended it to be eaten. And again, when one man kills another by the voluntary use of a deadly weapon, the law presumes that the killing was intended. In such cases it may be said, *res ipsa in se dolum habet*—the acts are evil and show a wrong intention in

themselves. *But in most cases the intention is not so clearly or conclusively shown that the law itself can draw the inference,* and it is necessary to prove acts and circumstances from which the court or jury may draw the inference as a fact. As said in a recent case (citing *Burke* v. *State*, 71 Ala. 377), *'intention is an inferential fact to be drawn by the jury from proven attendant facts and circumstances.'* "

Says Mr. Wharton, in his work on Evidence, Vol. 1, Sec. 508:

"A witness, also, is not to be permitted to testify as to the motives by which another person is or has been actuated. Motives are eminently inferences from conduct. The facts from which the inferences are to be drawn are to be detailed by the witnesses; *for the jury the work of inference is to be reserved.* Yet where a party is examined as to his own conduct, he may be asked as to his motive, his testimony to such motive being based, *not on inference*, BUT ON CONSCIOUSNESS."

(That direct testimony of intention in this class of cases outweighs mere inferences, see *In re Taylor Estate*, 43 Atl. R. 973.)

The Court of Appeals, notwithstanding no allegation in the pleadings challenged the issue, notwithstanding the parties to the transaction were not interrogated directly as to their intent and motive, notwithstanding their consciences were not "probed" under the sanction of an oath, notwithstanding that *from the nature of the pleadings* no such inquisition could be had, notwithstanding the direct finding of the master (made, not in response to the pleadings or proofs, but to the argument of respondents' counsel), that there was no evidence from which *he* could infer an intention to gamble, notwithstanding that this finding of the master was practically affirmed by the trial court—we say, notwithstanding

all this, the Circuit Court of Appeals, usurping the functions of the master or a jury *inferred from collateral circumstances that there was a mutual understanding and intention from the beginning to gamble*, AND GAVE THIS INFERENCE OF FACT THE SOLEMNITY OF A PRESUMPTION OF LAW.

We respectfully insist that having only appellate jurisdiction, the Circuit Court of Appeals was bound by the findings of the master, concurred in by the trial court, unless some obvious *error* intervened in the application of the *law*, or some serious or important *mistake* in a consideration of the *evidence* had been made; and we cite in support of this postulate:

Crawford v. *Neal*, 144 U. S. 585.
Furrer v. *Ferris*, 145 Id. 132.
Telighman v. *Proctor*, 125 Id. 136.
Kimberly v. *Arms*, 129 Id. 512.

2. Concurring in the language of the opinion that equity looks to the intent rather than the form, and that one who seeks relief must come open-handed, with clean hands, and that a court of equity has the right, and is charged with the duty, to probe the conscience of any litigant, we respectfully insist that to "probe" a conscience *involves an inquiry concerning it;* in the absence of which inquiry the Circuit Court of Appeals was without precedent or authority to ascribe of their own motion an unlawful intent to a party litigant *arising out of circumstances and facts equally consonant with a lawful intent.*

The opinion of the Circuit Court of Appeals seems to us to *assume* an unlawful intention on the part of every one connected with the transaction in all its phases, and to vindicate the assumption by reference to portions of the evidence and rules of the exchange which would not indicate

an intention to the contrary; whereas we respectfully insist that the court *should start with the presumption that the parties did not intend an unlawful act and did not intend to gamble, and that the machinery of the stock exchange clearing house was, like the machinery of every other clearing house, devised and inaugurated for the sole and only purpose of facilitating the transaction of lawful business; which presumptions we insist would have led the honorable court to a very different conclusion.*

3. We have carefully studied all the cases cited by the Circuit Court of Appeals in support of its conclusions and unhesitatingly affirm that not one of the cases cited militates against the doctrine of the cases from which we have been quoting, and that *not one of said cases is applicable to the case at bar*. Except the cases cited in the opinion as to the Illinois statute prohibiting optional contracts—which subject will be presently considered—it may be observed of them:

First. *In every case the defense of gambling was specially pleaded*, alleging a mutual understanding and agreement between the parties to settle according to differences in prices, without delivering the subject-matter of the contract.

Second. That where this issue of fact was thus presented by the pleadings, an assertion on the one side and a denial of gambling on the other, the courts *in every instance* submitted the question to the jury *as a question of fact to be determined by a probing of the consciences of the parties under oath as to their real intention and understanding, and the adduction of testimony as to every conceivable fact from which an intention could be inferred.*

Third. That in several cases the Supreme Court simply affirms the verdict of a jury or the findings of the lower court *without giving any intimation as to the particular facts elicited upon the trial.*

Such are the cases of:

Pickering v. *Cease*, 79 Ill. 328.
Lyon v. *Culbertson*, 83 Ill. 33.
Pearce v. *Foote*, 113 Ill. 228.
Cothran v. *Ellis*, 125 Ill. 496.

Concerning these cases Judge Gary, in *Postal Tel. Co.* v. *Lathrop*, 33 Ill. App. 402, states as follows:

"In the cases in this State, *Pickering* v. *Cease*, 79 Ill. 328; *Lyon* v. *Culbertson*, 83 Ill. 33; *Pearce* v. *Foote*, 113 Ill. 228; *Cothran* v. *Ellis*, 125 Ill. 496, and perhaps some others, the Supreme Court have not settled the facts upon which they animadverted, as they appear in this record."

These cases, of course, can throw no light on the case at bar further than the announcement of the general principle that contracts for future sale in which, according to the understanding and intention of the parties, the goods contracted for are not to be delivered but a settlement is to be made according to differences in price, are gambling contracts, and that gambling contracts are void.

Fourth. That in all other cases cited in the opinion of the Court of Appeals the intention of the parties was found *as a fact:*

1. By the sworn, direct testimony of one of the parties.
2. Corroborated by circumstances.

Fifth. IN EVERY INSTANCE THE INFERENCE DRAWN FROM SUCH CIRCUMSTANCES IS DUE TO THE INCONGRUITY OR INCONSISTENCY BETWEEN THE FACTS PROVEN AND THE INTENTION CLAIMED. They show, for instance:

1. A *series* of transactions beween the same parties covering a period of several months, involving *a large number of sales and purchases, all for future delivery, in which not a single commodity was delivered or tendered.*

2. That the aggregate number of such sales and purchases would foot up an enormous quantity of grain or pork or other commodities, aggregating in value hundreds of thousands, and in one instance cited, millions of dollars.

3. That the parties purporting to purchase or sell such commodities *could have no possible use for them*, inasmuch as they were in *entirely different employment*, being merely *mechanics, doctors, lawyers*, or, if grain dealers, engaged in the actual manufacture of meal and flour, *with a very small capital*.

Sixth. *That the financial status of these parties would not, within the range of sanity, warrant them in actually buying or selling such quantities and in such amounts.*

Seventh. That in every instance where a particular transaction was pronounced by the court to be gambling it was due to a most reasonable inference, *from just such facts as we have enumerated*, UNDER PLEADINGS RAISING THE ISSUE AS A QUESTION OF FACT.

Eighth. That where the facts developed were not so palpably inconsistent with an actual intention to receive or deliver, the juries and the courts have found the transaction to be valid and binding, and in one instance, at least (*Cothran* v. *Ellis*, 125 Ill. 496), the Supreme Court was constrained to affirm a finding in favor of the plaintiff, notwithstanding testimony from which the jury would have been amply justified in finding for the defendant.

And in *Bibb* v. *Allen*, 149 U. S. 481, the Supreme Court of the United States not only justified the lower court in instructing in favor of the plaintiff where the facts were infinitely more dubious than the facts in this case, but went further and declared that if there had been a finding in favor of the defendant the judgment would have been reversed.

Ninth. The authorities all show that the line of demarkation between legitimate speculations, which the law upholds, and gambling in prices, which the law condemns, *depends wholly and altogether upon the mutual intention and understanding of the parties existing from the beginning*—a most difficult question of fact, which must be affirmatively pleaded by the defendant, who thereupon assumes the burden of proof.

In not one of the cases cited in the opinion of the Circuit Court of Appeals has any court assumed or imputed an intention which all the parties to a transaction have disclaimed.

SPECIFIC CRITICISMS.

First. In searching the record for evidence of an intention to gamble, the opinion quotes from the principal brief of petitioners' counsel the language in which they attempted to formulate the terms of the contract of employment between petitioners and their agents, Schwartz, Dupee & Company.

It is to be noted in the first place that this does not involve *any conduct of the parties or course of dealing between them, and could not, therefore, be a fact or circumstance from which an inference of intention could be evolved.* More particularly is it to be noted that it was simply an attempt *on the part of counsel* to formulate in words what any authority to deal on the stock exchange, in pursuance of its customs and regulations must include; in other words, it was an attempt to explain the *rationale* of the daily novations and substitutions made in pursuance of the rules.

Our language was, perhaps, not as clear as it should have been. We have attempted in this application a similar explanation but in different language. We have shown, we

hope, that these daily novations and substitutions do not involve any element of risk, can not by any possibility result in loss or gain, injury or advantage to the person consenting to them, do not absolve the parties from their obligation to deliver or receive the number of shares contracted for at the time specified, do not transmute a contract for absolute sale into an option or privilege contract, do not, in short, afford any motive or inducement, so far as individual interest is concerned, to *consent* to such mutations and novations, and that *the only possible object is to accommodate the stock exchange as an institution, and to make easy its bookkeeping and the transaction of its business.*

Second. The opinion refers to the correspondence between the petitioners and their brokers where the former make inquiries concerning the "difference" demanded to change to August account, and the change is then ordered and reported as made by allowing the "difference."

These messages were sent on the 25th day of July. It will be observed that the first message was a direct order to change to August account at 2½ with the added phrase: "If you can not do it, let us know at once.

The next message, sent the same day states:

"You sent us the difference this morning at 2½. At what difference can you do it now?"

On July 27th the petitioners ordered their brokers, as follows:

"Change 200 more Diamond Match at two per cent or better."

And on the same day the brokers wired petitioners as follows:

"We changed the 200 match at 2½ difference. Will give you PRICE later."

Now what does this mean?

Every broker in the world knows that it does not have the meaning which the opinion of the Circuit Court of Appeals would bestow upon it. Indeed, the very language of the telegrams militates against the inference the Circuit Court of Appeals would make.

These telegrams show:

1. That instead of being compelled, according to the terms of their contract, to deliver the stock on the 31st day of July, the petitioners wished to have the time extended to the 31st of August.

What inference would a jury make from this request? If the petitioners recognized no obligation to deliver on the 31st of July why should they manifest any desire to have the time extended to August 31st? If they knew the purchaser was not required to accept, why should they expect compensation for extending the day of delivery?

2. The telegrams not only indicate a willingness on the part of petitioners to postpone the day of delivery, but they manifest a desire on their part to receive compensation for the accommodation. What inference would a jury draw from this? Why expect pay for an accommodation if there was no obligation?

3. The telegrams even indicate the price that petitioners were willing to receive for the accommodation, and the word "difference," used by the petitioners, is simply synonymous with the word "price." They might just as well have inquired on what terms, or at what price could the accommodation be obtained; but they express themselves in terms of percentages. Even their telegram, "Change the five hundred at two cents or better," meant two per cent or better.

It was in reference solely to the cost or price of the accommodation which they were willing to extend that the

word "difference" was used. Is not this obvious from the telegrams?

4. If the privilege of postponing acceptance to August 31st had not been granted by the petitioners, or if the price offered for the accommodation had been less than petitioners were willing to accept, what, presumably, would have been the result? Clearly the petitioners would have been obliged to make delivery on the 31st of July, and the purchasers, whoever they might be, would be obliged to accept the shares tendered or take the consequences of their breach of contract.

5. But if petitioners had instructed their agents to close out the deal absolutely, and settle according to "difference in price," this would afford very slight inference that the original intention of the petitioners, to say nothing of the intention of the first purchaser or the ultimate purchaser, or any intermediate purchaser, was to gamble, and no inference whatever that the original understanding and agreement was to settle in differences.

A thousand and one contingencies can be surmised that would make this the wise and proper course to pursue.

6. The fact remains, however, that the contract was not settled by the payment of differences, but that the time of delivery was extended to the 31st of August, and that the petitioners received a consideration for the accommodation.

Third. The opinion further states that there is neither averment nor pretense that the petitioners had or controlled any shares of the stock, or procured, or intended to procure, the same for delivery.

What rule of pleading makes *proper*, much less *requires* the allegation in a bill that at the time of entering into a contract for sale plaintiff was the owner of the subject-matter of the contract, or had means of procuring the same,

or intended to procure the same? Is not this transposing the onus of proof?

According to the Circuit Court of Appeals' implication the demurrer to petitioners' bill should have been sustained for lack of these allegations; but if the law starts out with the presumption that the contract was lawful it must, of necessity, include the presumption that the petitioners either had the stock, or could procure it, or intended to procure it, for delivery. Can an inference of unlawful intention arise from the absence of testimony showing affirmatively a lawful intent?

Fourth. The opinion further states that "it is conceded that they (petitioners) had no stock at any time in the hands of their brokers, and no property in the stock of which pretended tender and sale was made after the alleged default."

First protesting that no inference of unlawful intent is warranted from this alleged fact, and further protesting that the testimony does not show but that the petitioners had the shares of stock in New York, we make bold to assert that the statement does not conform absolutely to the testimony. That petitioners' brokers had the stock ready to be delivered at any time, is a reasonable inference from the fact that it was furnished on the day of delivery; that this stock was at the command and disposal of the petitioners is also reasonably inferable from the fact that it was tendered in their behalf to the respondents, Jamieson & Company, and by the all-important fact that when tender was made the title to the stock vested then and there, *eo instanti*, in the respondents, Jamieson & Co. *Thenceforth it was their stock*, to be held by the petitioners or their brokers, subject to respondents' orders on complying with their contract, or to be sold by petitioners or their brokers as *quasi* agents of the respondents, and the proceeds applied on account.

Fifth. The opinion refers to the rule of the stock ex-

change making distinct provision for closing contracts by paying the difference in market price, and further states that the contract in question was made with reference to such rule and by parties unquestionably acquainted with it, and from this rule itself the Circuit Court of Appeals infer an understanding of the parties that only a settlement of differences in price was contemplated.

We submit that the rules of the stock exchange should be construed together, and, if possible, they should be construed as contemplating the transaction of lawful business.

Art. 15, Sec. 1, provides: "Any member who fails to comply with his contracts, or becomes insolvent, shall be suspended until he has settled with his creditors," etc.

Article 17, Sec. 1, provides as follows:

"No fictitious sales shall be made. Any member contravening this section shall, upon conviction, be suspended by the governing committee."

Section 2 provides:

"Any member who shall make fictitious or trifling bids shall, upon conviction, be subject to suspension, or such other penalty as the governing committee shall impose."

Article XVIII provides:

"In all deliveries of stocks, bonds, etc., the party delivering shall have the right to require the purchase money to be paid at the time and place of delivery."

Article XXIX provides:

"Any member of this exchange who is interested in, or associated with, or whose office is connected directly or indirectly by wire or other method or contrivance, with any organization, firm or individual engaged in the business of dealing in differences or quotations on the fluctuations in the market price of any commodity or security, without a *bona fide* purchase or sale of said commodity or security, in

a regular market or exchange, shall, on conviction thereof, be deemed to have committed an act or acts detrimental to the interest and welfare of the exchange."

Article 4 of the BY-LAWS provides:

"*No sale of securities shall be made on which a deposit shall be offered as the limit of liability.*" * * *

Article 7, Sec. 1, provides:

"All deliveries of securities must be made between 11 A. M. and 1:30 o'clock P. M., or the buyer may demand that they shall lie over until the next day without interest, when they shall be delivered before 10:30 o'clock A. M., and when deliveries are not made at that time the contract may be closed under the rule after due notice to the defaulting party, as provided in Art. XVII of the by-laws. * * *

In the absence of any notice or agreement, the contract shall continue without interest until the following day, when the same rule shall apply. In every case of non-delivery, however, the party in default shall be liable, in addition, for the damages that may accrue."

Article XVII provides:

"Should any member neglect to fulfill his contract on the day it becomes due, the party or parties contracting with him shall, after giving notice as required by Sec. 2 of the preceding article, employ an officer of the board to close the same forthwith in the exchange by purchase or sale, as the case may require, unless the price of settlement has been agreed upon by the contracting parties. In case of a failure of a creditor to close the contract as above, the price shall be fixed by the price current at the time such contract ought to have been closed under the rule. In all cases where an officer may be directed to buy or sell securities under this rule, the name of the member defaulting, as well as that of the member giving the order shall be an-

nounced. No order for the purchase or sale of securities under this rule shall be executed unless made out in writing over the signature of the party giving the order, who shall state the reason therefor; and it shall be the duty of the officer who executes the order to indorse thereon the name of the purchaser or seller, the price, and the hour at which the contract is closed, and hand the same to the secretary of the board, who shall within twenty-four hours, ascertain whether the party for whose account the order was given has paid the difference, if any, arising from the transaction; if not, the secretary shall report the default to the president. The duty devolved upon the officers of the exchange under this rule shall be performed without charge. No party shall be permitted to supply offers to buy or sell securities closed for his account under the rule; and when a contract is closed under this rule, any action of the defaulter, direct or indirect, by which the prompt fulfillment of such contract is delayed, hindered or evaded, to the detriment of the other contracting party, shall subject the offending party to suspension for not less than thirty days, in the discretion of the governing committee, by a vote of two-thirds of the members present at the meeting. When contracts are closed out under the rule, any member supplying the bid or offer, and not duly receiving or delivering the stock, as the case may be, renders himself liable to prosecution under this article. Should any stock thus sold not be delivered until the next day, the contract shall continue, but the defaulting party shall be liable to pay such damage as may be assessed by the arbitration committee," etc.

Tr. p. 125. Under CLEARING-HOUSE RULES, Sec. 2 provides:

"Deliveries of cash stock or transactions for 'the account' shall be made on the last day of each month. Provided,

however, should the last day of any month occur on a holiday, or on a day when the exchange is closed for business, then in that case deliveries shall be made on the first day *preceding.*"

Sec. 6 provides: Tr. p. 128.

"Stock balances, as shown by the statements, rendered for cash settling days, must be delivered and paid for at the closing bid price of the previous day, as per manager's notices, before 1:30 P. M. Provided, however, if satisfactory evidence is shown the clearing house committee that the cash stock is on hand in New York, or in transit for Chicago, three days' grace will be given the seller to make the delivery with interest, failing in which the clearing house committee shall cause to be purchased for account of delinquent, said stock, in whichever market in their judgment seems best; and the party so failing to deliver shall be held responsible for all loss or damage arising therefrom; but when a failure to receive or deliver occurs, nothing in these notifications shall be construed to relieve the last contracting parties to the transaction from the liabilities to each other."

Section 8 provides:

"Whenever a member is unable to meet his contracts or transactions made for 'the account,' he shall make a statement of his transactions, to be audited that day, and deliver it to the manager or presiding officer of the exchange."

Section 10 provides:

"The same rule as to notice, time and place, that govern defaults in other contracts shall apply to transactions for 'the account.'"

The inference made by the Circuit Court of Appeals from the rule quoted by them would reduce the foregoing rules prohibiting fictitious sales, and denouncing penalties for

their violation, to a mere *brutum fulmen*. The opinion of the Court of Appeals practically finds as a fact that the rules of the stock exchange *contemplate only* gambling transactions and *require* parties to settle by payment of differences; *for if the rule in question, while affording facilities for gambling, gives equal facilities to those lawfully inclined to prosecute their bargains to a lawful conclusion, no inference of gambling ought to be drawn from the rule itself.* THE RULE WOULD AFFORD NO BASIS FOR INFERENCE OF INTENTION ONE WAY OR THE OTHER.

But we respectfully insist that the honorable court misapprehended the meaning and purpose of the rule. *It purports to provide a remedy* FOR THE BREACH OF CONTRACT *by any member of the exchange and fixes a penalty for such breach.*

In this respect it differs in no wise from a great many important contracts entered into between individuals. It is a most just rule. The measure of damages which it prescribes for breach of contract is precisely the measure of damages which the law itself would prescribe.

The members of the stock exchange could not assume that every contract made upon its floors would be faithfully observed. They were, on the contrary, bound to assume that contracts would be broken *and if they assumed this they had a right, for the internal harmony and autonomy of their institution, to prescribe what, according to their sense of justice, should be the penalty or measure of damages, and in determining what this measure should be they copied from the law.*

To infer, *as a matter of fact,* an original understanding and agreement of the parties to settle their contracts by the payment of differences in price, simply because the rules prescribe that upon breach of contract the party breaking the contract shall pay certain damages (and these

damages precisely the same as the law would inflict) *is, we submit, to infer an unlawful intention from a lawful act.*

The rule which the honorable court evidently had in mind is article 17 of the by-laws. It starts out by saying:

"*Should* any member neglect to fulfill his contract *on the day it becomes due,*" etc. Would it not be inferred from this language that the member was ordinarily *expected* to fulfill his contract?

The rule further says: "Should any stock thus sold *not be delivered until the next day* the contract shall continue, but the defaulting party shall be liable to pay such damages as may be assessed by the arbitration committee."

Why talk about the delivery of stock if no delivery of stock is contemplated by the rule?—if they are dealing in figments or abstract numbers?

But, as already observed, these rules are only intended for the discipline of the members, who alone are permitted to deal upon the floor of the exchange, but who, in nearly every instance, are dealing not for themselves, but for others.

Sixth. The language of the opinion shows a misapprehension of the word "option," and of the purposes of the Illinois statute declaring that:

"Whoever contracts to have or give to himself or another *the option to sell or buy* at a future time any grain or other commodity, etc., * * * shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year or both; and all contracts made *in violation of this section* shall be considered gambling contracts, and shall be void." (1 Starr & Curtis An. Stat., 2d Ed, pp. 1293, 1298, Sec. 130.)

Now, we take it that no contract which *on its face* purports to be a contract for the sale of a commodity to be delivered

at a future time *certain* has ever been called an option contract. The statute was aimed at "puts" and "calls."

See *Pixley* v. *Boynton*, 79 Ill. 351, which also defines these terms as follows: "A 'put' is a *privilege* to deliver or not deliver grain or other commodity; a 'call' is a *privilege* to call or decline to call for such delivery."

It must be obvious that the "privilege" here spoken of is not the mere privilege *to break a contract*, for that "privilege" inheres in every contract—with certain legal penalties for the exercise of it; but the privilege meant is the privilege to deliver or not to deliver, to receive or not to receive, *without a breach of contract;* in other words, THE "PRIVILEGE" IS THE VERY THING CONTRACTED FOR.

That such a contract would be valid at common law goes without saying. A contract to gamble in difference of price, however, would now-a-days require no statute to render it void. Therefore the language quoted in the opinion from *Schneider* v. *Turner*, 130 Ill. 28, to the effect that something more was intended by the legislature than the prohibition of gambling is eminently correct.

As already observed, the legislature had in mind the option contracts known as "puts" and "calls," but the effect of the statute has been more far-reaching, perhaps, than the legislature contemplated.

For instance, if a manufacturer, expecting a large order for goods, should go to a coal merchant and make known that in a certain contingency he would want a large amount of coal, but in another contingency he would not need any, and should enter into a contract with a coal merchant, for a consideration in hand paid, to take a certain amount of coal at a particular date *or not, as he might elect*, the common law would sustain the contract, for the motive which inspired it would be worthy and the consideration paid for the option

25225

presumably adequate. But just such a contract has been pronounced void under the Illinois statute.

See *Corcoran* v. *Lehigh & Franklin Coal Co.*, 138 Ill. 390.

If a clothier, for a consideration in hand, should agree to deliver a suit of clothes to a customer on or before Monday next, would it be pretended that such a contract is obnoxious to the Illinois statute against options? Or if, at the time appointed for delivery, the merchant should wait upon his customer and desire an extension of the time till the following Monday, agreeing in consideration of such extension to a reduction in the price, would it be contended that such a contract was obnoxious to the Illinois statutes against dealing in options?

Says Chief Justice SCOTT, in *Pixley* v. *Boynton, supra*, of a contract for delivery "on or before" the last day of July:

"Under such a contract, as we understand the evidence, all the option the seller has is the privilege to deliver the grain at any time before the maturity of the contract. This is nothing more than a time contract, which is regarded on the board of trade and elsewhere as a legitimate and regular contract. Time contracts in relation to grain, as well as other commodities, are of daily occurrence, and must necessarily be in commercial transactions. * * * The contract between the parties to this transaction was not an optional one, in the sense of 'puts and calls.' The only option the seller had was as to the time of the delivery. The legal effect of his agreement was that he should deliver the grain contracted to be sold within a limited period."

In the case at bar there was not even an option as to time of delivery. The stock was not required to be accepted

before the August account day, which was the last day of the month.

The case of *Schneider* v. *Turner*, 130 Ill. 28, was clearly an option contract. The written contract was as follows:

"Chicago, November 11, 1885.

In consideration of one dollar ($1.00) and other valuable considerations, receipt of which is hereby acknowledged, I hereby agree to sell to George Schneider, Walter L. Peck and Ferd W. Peck, seventeen hundred and eighty-six (1786) shares of the capital stock of the North Chicago City Railway at six hundred dollars ($600) per share, *if* taken on or before the 15th day of December, 1885.

(Signed) V. C. TURNER."

Nowhere in this contract is there a promise on the part of Schneider et al. to take the shares at any time. If they exercise the privilege before the 15th day of December, 1885, the seller undertook and agreed to deliver a certain number of shares at a certain price. But that it gave Schneider *et al.* an option *to buy or not, as they might elect*, seems too plain for discussion.

It was contended by the appellant that the contract was an executory contract of sale and on the part of the appellee that it created a mere option. The court say, p. 36:

"Looking at the instrument itself, it seems impossible to give it the construction contended for by appellants, without violating plain and well-settled rules of law applicable to all instruments in writing. * * * The construction contended for ignores the first clause of the instrument entirely, and gives to the word 'if' in the last sentence, an entirely different meaning from that ordinarily attached to it, thus making the contract in effect read, 'I hereby agree to sell to George Schneider, Walter L. Peck and Ferdinand W. Peck 1786 shares of the capital stock of the North Chi-

cago City Railway stock, at $600 per share, to be taken (or they to take the same) on or before the 15th day of December, 1885.' *So read, it would undoubtedly under the authorities cited, be an absolute contract of sale of the shares of stock.* * * *

The plain, unambigious meaning of the contract (treating it as such) is, that appellants paid appellee a valuable consideration for the refusal or privilege to buy 1,786 shares of stock of the North Chicago City Railway Company at $600 per share, at any time on or before the 15th of December, 1885—a contract heretofore of frequent occurrence in commercial transactions, perfectly legal and enforceable at common law. In the absence of section 130, no one, it seems to us, would hesitate to pronounce this a contract to give to appellants the option to buy railroad stock at a future time."

This identical section of the Illinois statute was passed upon by this court in *White* v. *Barber*, 123 U. S. 392. The syllabus of the case reads as follows:

"A *bona fide* contract for the actual sale of grain, deliverable within a specified future month, the only option which is an option in the seller to deliver it at any time within such month, is not a gambling contract, within the meaning of Sec. 130 of Chap. 38 of the Revised Statutes of Illinois. (Hurd's Ed. of 1883, p. 394; do. of 1885, p. 405.)

"W claimed to recover from B, by a suit in equity, money which he had put into the hands of B, as a broker, to be used by him in transactions which W alleged were wagering contracts, because they were sales of wheat in regard to which both W and B did not intend there should be any delivery of the wheat: Held, that what W did in connection with the transactions was inconsistent with such claim; that B had no such understanding; that the sales of wheat

were lawful; and that W was not entitled to recover the money which B had paid out.

"B having paid out the money in settlement of the sales according to the rules of the board of trade of Chicago, was not a "winner" of the money from W, within the meaning of Sec. 132 of Chap. 38 of the Revised Statutes of Illinois. (Hurd's Ed. of 1883, p. 394; do of 1885, p. 405.)"

STARTING WITH THE PRESUMPTIONS THAT THE PARTIES WERE INNOCENT OF AN UNLAWFUL INTENTION, AND THAT THE MACHINERY OF THE STOCK EXCHANGE CLEARING HOUSE WAS DEVISED FOR THE PURPOSE OF FACILITATING LAWFUL EXCHANGES; AT WHAT STAGE OF THE TRANSACTION DID IT BECOME EVIDENT THAT THE PARTIES INTENDED TO GAMBLE, AND WHEN AND WHEREIN DOES IT APPEAR THAT THE MACHINERY OF THE CLEARING HOUSE WAS INADEQUATE TO CONSUMMATE A LAWFUL CONTRACT IN LEGAL AND PRACTICAL EFFECT AS CONTEMPLATED BY THE PARTIES, AND AT WHAT STAGE OF THE PROCEEDINGS WAS THE CONTRACT OF SALE AND PURCHASE ABSOLUTE CONVERTED INTO AN OPTIONAL CONTRACT TO SELL OR NOT TO SELL AT THE ELECTION OF THE PARTIES?

A brief analysis of the transactions from July 16 and July 20, 1896, to August 3, 1896, will show that the intention of the parties was throughout lawful and the contract of sale absolute.

First. In entering into the contract of August 3, 1896 (the contract here sued upon), is there any proof in the record that either Schwartz, Dupee & Company or Jamieson & Company intended to gamble?

1. There is nothing on the face of the contract to indicate such an intention.

2. Neither party to the contract has testified in the case that such was his intention.

3. No such claim has been made even in the pleadings.

4. Such an intention would overthrow the legal presumption of innocence and ought not, therefore, to be indulged in the absence of testimony.

5. Being both members of the stock exchange, Schwartz, Dupee & Company and Jamieson & Company would be presumed to have contracted with reference to its rules, and an intention to gamble would contravene the rules and make the offenders liable to expulsion.

6. Furthermore, Jamieson & Company and Schwartz, Dupee & Company *were not contracting on their own behalf;* they were each representing undisclosed principals. In making themselves liable for such undisclosed principals, they had presumably taken the precaution to protect themselves against loss by requiring ample security. IF IT WAS THE *bona fide* INTENTION OF THEIR PRINCIPALS TO BUY AND SELL, THERE COULD NOT BE, IN THE NATURE OF THINGS, AN INTENTION ON THE PART OF THE AGENTS TO GAMBLE.

7. And even if their principals intended to gamble, it would not follow that their brokers. making themselves individually liable on their principals' account, would share such intention; for it would not only violate the rules of their organization and so make them liable to expulsion therefrom, *but it would vitiate their security, making them liable for any money of their principals lost in the transaction.*

8. So far as the intention of Schwartz, Dupee & Company and Jamieson & Company is concerned, *it would obviously not be to their interest, in any aspect of the case, to gamble.*

Second. Did W. H. & J. H. Moore, for whom Jamieson & Company claim they were acting, intend to gamble? Neither of the Moores was a witness in the case, nor was it claimed by Jamieson & Company on their behalf that they, or either of them, intended to gamble.

We have in the answer of Jamieson & Company the simple assertion that in the contract of August 3d they were acting for W. H. & J. H. Moore. We have in evidence the bare fact that when tender of stock was made to Jamieson & Company on the 31st of August, they refused to receive it because the Moore Brothers, for whom they had acted, would not receive it from them. Why the Moore Brothers would not receive it is a matter of conjecture. There is certainly no evidence that they, or either of them, intended to gamble.

Third. Did any intermediate purchaser between July 16th and August 3d, intend to gamble? The names of these persons could not be traced except from examination of the private books of the brokers. The result of such examination was stipulated into the record and can be found on page 66, *et seq.*, of the transcript. No person named in this stipulation was examined as a witness, or his intention sought to be discovered. There is, therefore, no evidence that any intermediate purchaser intended to gamble.

Fourth. Did Henry Clews & Company intend to gamble? Their intention in the premises has not been made an issue in the case; no member of the firm was called as a witness; no other witness was interrogated on the point. So far as *oral* testimony is concerned, there is no evidence of an intention on the part of Henry Clews & Company to gamble.

Fifth. Was there any circumstance developed in the testimony from which an intention of Henry Clews & Company to gamble could be reasonably inferred—any course of dealing covering any period of time, anything in the financial status or usual business of the petitioners that would make a transaction of the kind incongruous? The testimony shows that the usual and ordinary business

of the petitioners was the buying and selling of corporate stocks; that they should have sold the particular stock, therefore, was neither suspicious nor out of character. Whether at the time of making the sale they actually owned the stock to answer to it, does not appear; and we respectfully submit that it does not matter. That they had the means of procuring the stock is pretty evident from the fact that it was tendered, and that the title thereto when tendered passed to Jamieson & Company. Indeed, it was one of the duties of their brokers, Schwartz, Dupee & Company, under their contract of employment, to furnish the stock in the first instance.

See *Markham* v. *Joudon*, 41 N. Y. 235–239.

Was it the original intention of Clews & Company not to deliver the stock, even though they might own or control it? The evidence is likewise silent on this point, and as a mere *ex parte* intention likewise immaterial. BUT THAT THERE COULD BE NO MUTUAL UNDERSTANDING AND AGREEMENT BETWEEN CLEWS & COMPANY AND ANY PURCHASER, MEDIATE OR IMMEDIATE, ORIGINAL OR ULTIMATE, NOT TO DELIVER THE NUMBER OF SHARES CONTRACTED FOR, IS ABSOLUTELY CERTAIN, FROM THE FACT THAT HENRY CLEWS & COMPANY DID NOT EVEN KNOW WHO SUCH PURCHASERS WERE OR MIGHT BE.

Sixth. Was there, then, anything in the documentary evidence or the rules and customs of the stock exchange which indicated an intention to gamble? Let us commence at the beginning.

On the 16th day of July, 1896, petitioners wired their brokers, Schwartz, Dupee & Co., as follows:

"Sell 500 Diamond Match at 220½ for account."

On the same day Schwartz, Dupee & Co., notified the petitioners as follows:

"Sold 500 Diamond Match at 221⅛ for the account."

To whom was this sold? Petitioners were not at the time advised, but they *were* advised that a contract had been entered into on their behalf whereby they contracted with *somebody* to deliver to him on the last day of July, 1896, 500 shares of Diamond Match stock for $221.12½ per share.

Tr. p. 104. *And it is stipulated that such a sale was made.*

Stopping at *this* point, and in the absence of any other testimony, what is to be said of this contract? Is it *prima facie* illegal?

One thing certain, it is not a contract for a *privilege* or an *option*. It *obligates* the petitioners *to deliver* a certain number of shares to the contractee at a certain time and at a certain price. If it is *prima facie* illegal, *so is every other contract for future delivery.*

Does the contract indicate an intention to gamble? Would any court permit a jury *to infer a mutual understanding and intention* of the parties *not* to deliver or receive the shares contracted for from the terms of a contract which said they *must?*

But the question recurs, at *what point* in the history of this transaction *did it become evident* that the *original intention* of the petitioners was to gamble? Or when was the *absolute* contract for sale converted into an *optional* contract to sell or not to sell?

CERTAINLY NOT ON THE 16TH DAY OF JULY. DURING TWENTY-FOUR HOURS, THEREFORE, THE CONTRACT APPEARED TO BE BOTH LEGAL AND BINDING.

Let us proceed to the day following, when we will assume that there was substituted by the manager of the stock exchange for the original contractee a new purchaser at a lesser price.

Nobody will contend that ordinarily the petitioners or their agents would be *bound to consent* to this substitution.

25229

Ordinarily, and according to the conventional contract, the parties would remain the same *to the end*, in which event, we venture to say, the Court of Appeals would not have branded the contract as unlawful or the parties to it as amenable to the criminal code.

But (and to this question, so it seems to us, the whole controversy has reduced itself) *would the consent of the petitioners to the novation of the contract and the substitution of a new contractee render it illegal? If so, why? If the original contract indicated no intention to gamble, what element in the new contract would indicate such an intention?* Petitioners certainly had a right to make the novation if their contractee would assent to it.

Whether either party could be *induced* to consent to the novation would depend entirely upon circumstances.

The manager of the stock exchange clearing house, in whom is vested plenary authority to make these substitutions, makes them according to the *number* of shares sold, without reference to the *price*. It is an immense service *to him* in keeping books and in effecting exchanges.

He therefore, we will say, undertakes to substitute for A (the original purchaser), B, *who has purchased a like number of shares*. B, however, instead of purchasing his shares at 221⅛ agreed to take them, we will say, only at 220. *He would not consent, therefore, to be substituted under a contract that called for the payment of* 221⅛ *per share, nor could the seller be expected to accept as a substitute some one who agreed to pay only 220 per share.* But if the substitution is to take place, *if this great advantage in bookkeeping and facilitating exchanges is to be realized,* some method *must* be devised whereby petitioners will be willing to accept B, and B will be willing to accept petitioners.

Obviously this can only be done by *equating* the prices.

If this is done the parties can have no reasonable excuse for withholding their consent. It would be a distinction without a difference. Neither party would be *benefited*, neither party would be *injured;* neither party would *make* a cent, neither party would *lose* a cent, by the transaction. THE ONLY POSSIBLE BENEFIT, THEREFORE, WOULD BE TO THE EXCHANGE ITSELF AND THE ONLY POSSIBLE OBJECT WOULD BE THE AVOWED OBJECT OF FACILITATING BOOKKEEPING AND EXCHANGES.

Surely this object is not an unlawful one.

What we are in search of, however, is evidence of an intention to gamble, and this the Circuit Court of Appeals affect to find, *not in prior dealings of the parties* (for, so far as the testimony reveals, this was the only transaction ever had between them), *not in the original contract itself* (for that was absolute and unequivocal for the sale of a number of shares of stock at a certain price at a certain time), but in the subsequent mutations of the contract growing out of the rules and customs peculiar to the stock exchange, *involving no risk to the petitioners, no possibility of gain or loss to them, modifying in no essential particular the original purpose of the petitioners, affording no motive or object to the petitioners to assent to them except the motive to accommodate the exchange itself.*

Respectfully submitted,

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HENRY D. ESTABROOK,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 245.

HENRY CLEWS ET AL.,
vs.
MALCOLM M. JAMIESON ET AL.

Certiorari to Circuit Court of Appeals, Seventh Circuit

Reply Brief of Petitioners to Brief of Respondents, Jamieson & Company.

MAY IT PLEASE THE COURT:

The brief of counsel for respondents, Jamieson & Company, is noteworthy in several respects:

First. Counsel refuse to discuss the question of gambling. They manifest a willingness, not to say anxiety, to eliminate this question from the case.

"We therefore point out to the court as a sort of summing up of our propositions," say they (p. 79) "that our position, and that of our clients, maintains the legality of the transactions on the exchange."

Whatever be the motive for this "position"—whether fear of expulsion from the Exchange should such position be maintained, or because the doctrine would invalidate

transactions in which these brokers are otherwise interested, or because the authorities on the subject are too plain to admit of argument—whatever the motive we sincerely hope that your Honors will not attribute their concession to a tacit collusion between the parties not to raise the point, nor to that *pseudo*-chivalry which is popularly supposed to obtain among blacklegs and gamblers; as, we have reason to know, was the mistaken suspicion of the Court of Appeals.

The question of gambling is in the case, because the Court of Appeals put it there, and made it the sole ground of its decision. If the vice of gambling is made to depend upon an agreement or understanding of the parties not to deliver but to settle differences, collateral to the ostensible contract to buy or sell, or, rather, which is *part and substance of that very contract*, then we maintain that the daily mutations of the contract through the Stock Exchange Clearing House is proof positive that no such illegal agreement or understanding existed. It is incredible that the unknown principals in these daily substitutions could have *agreed* to settle according to differences in price. On the other hand, if a perfectly legal contract to buy or sell is, by the manipulations of the Stock Exchange, *necessarily* converted into an illegal and gambling contract, regardless of the intentions of the real parties in interest, we want to know it. If the Stock Exchange itself has no possible *motive* to invalidate such a contract; if the real parties to it never *intended* such a result; if the manipulations, however difficult to follow, are for the accommodation and convenience of the Stock Exchange as an institution, involving no risk, nor possibility of gain or loss to the parties, why should such course of dealing be held contrary to good morals?

Second. It is not pretended that the transaction, out of

which rose this controversy, was at all unusual in any of its phases, up to the point of closing the Exchange, August 4, 1896; and it is conceded, therefore, that the sale launched upon the Chicago Stock Exchange by the complainants in July, 1896, resulted naturally, and in the ordinary course of events, in the contract of August 3d here sued upon. In other words, that every contract "for the account," that is to say, for future delivery, must, if made upon the Chicago Stock Exchange, inevitably go through similar transmutations.

Third. But it is argued that such transmutations, *even if assented to*, result in destroying, *in every instance*, all privity of contract between the undisclosed principals of the members of the Exchange and the other contracting member, so that no one not a member of the Exchange can call any of its members to account in a court of law or equity.

Fourth. It is insisted, however, that the *rules of the Exchange* have provided a speedy and adequate means for the redress of such unfortunates, and that if the petitioners had only awaited indefinitely the opening of the Exchange, they, *through their brokers, Schwartz, Dupee & Company*, could have obtained full satisfaction of their claim against Jamieson & Company at the price current; the corollary being that if the Exchange had never re-opened the petitioners would have no redress except against their particular brokers; the further corollary being that had they employed such brokers "without recourse" they would have no redress whatever.

From these postulates it would seem to follow that we have here an institution, namely, the Stock Exchange, quite as important in its commercial relationships as the banks or railroads, which is perfectly legal in all its dealings, but so extraordinary in its composition, constituents, modes, methods, rules and practices, that it is a law unto itself,

and that all who enter its portals must leave behind hope of rescue by the courts.

This case has proceeded upon the theory that the methods of the Stock Exchange *are* legal; that those who consent to deal with it do not thereupon surrender their citizenship or submit themselves to a foreign sovereignty; and that if the Stock Exchange itself can prescribe an adequate remedy for wrongs inflicted by its members (if the person aggrieved will only await its motion), a court of equity will somehow manage to evolve an equally adequate remedy "without the aid or consent of any other nation."

The Deadly Parallel.

We will not complain that counsel for respondents, Jamieson & Company, have attempted to substitute for the undisputed facts in the case a written stipulation relating to what we conceive to be an altogether collateral point, further than to remark that if the inference sought to be drawn from the stipulation was warranted it would be a mere *conclusion* of counsel for petitioners, drawn from facts which *in themselves*, do not justify such a conclusion. But counsel absolutely pervert the meaning of the stipulation; not by misquotations, to be sure, but by italicizing certain words which the stipulation itself takes pains to qualify. On pages 8 and 9 of their brief we have the stipulation set forth as follows:

"That the transactions heretofore set out in this stipulation of purchase and sale by Schwartz, Dupee & Co., Jamieson & Co., and the other brokers whose names are stated, with the exception of those transactions which are marked as substitutions, were had by the brokers on behalf of different clients or principals whom they represented, *and those transactions, so far as the different principals are concerned, were not settled or canceled by* any of the substitutions, nor by any of *the settlements between the brokers*, except so

far as where one client or principal of a broker was, through such broker, both a purchaser, and a seller. In other words, the settlements by substitutions or otherwise through the clearing house *were merely settlements between the members of the Stock Exchange, and were not settlements or cancellations of the contracts between the principals whom the brokers represented and the brokers themselves*, except where the same broker had both purchased and sold for the same client."

Without calling in the aid of the "deadly parallel," we ask your honors to read the same words with the stress laid where we think it properly belongs:

"That the transactions heretofore set out in this stipulation of purchase and sale by Schwartz, Dupee & Co., Jamieson & Co., and the other brokers whose names are stated, with the exception of those transactions which are marked as substitutions, were had by the brokers on behalf of different clients or principals whom they represented, and those transactions, so far as the different principals are concerned, were not settled or canceled by any of the substitutions, nor by any of the settlements between the brokers, *except so far as where one client or principal of a broker was, through such broker, both a purchaser and a seller.* In other words, the settlements by substitutions or otherwise through the clearing house were merely settlements between the members of the Stock Exchange, and were not settlements or cancellations of the contracts *between the principals* (whom the brokers represented) *and the brokers themselves, except where the same broker had both purchased and sold for the same client.*"

As to the terms of the contract between the principal and his broker (which alone the stipulation purports to cover), see our principal brief, pp. 62 and 63; but the precise meaning and application of the stipulation will become more apparent on analysis of the transactions to which it refers.

Before entering upon this explanation we wish to call attention to a very obvious, but seemingly anomalous, result inherent in the clearing house principle. Let us assume that on the first day of August, 1896, Schwartz, Dupee & Company, sell on the Chicago Stock Exchange 700 shares

Diamond Match stock for client A, and the sale is made to broker X. At the close of the Exchange, Schwartz, Dupee & Company would be handed by the manager of the Exchange a card in which there has been substituted the purchaser Y. Here on the very day of sale, it will be observed, there has been a novation. Schwartz, Dupee & Company are 700 shares "short" in the clearing house, and their client A has presumably paid them $7,000 which they have deposited with the Exchange as a trust fund. On the day following, however, Schwartz, Dupee & Company *buy* 700 shares of Diamond Match stock through the clearing house for client B., who has presumably paid to them $7,000 as security for the performance of their contract. But at the close of the Exchange on that particular day the manager of the clearing house finds that Schwartz, Dupee & Company have sold in the clearing house 700 shares of Diamond Match stock and have purchased in the clearing house a like number of shares, *which balances their account*, consequently, so far as the books of the clearing house are concerned, it would not appear that Schwartz, Dupee & Company had *any transaction whatever* on that day. Nevertheless the fact would remain that Schwartz, Dupee & Company had a client, A, for whom they had sold 700 shares and a client B for whom they had purchased 700 shares, and they would, therefore, have a buyer and purchaser whom they would be prepared at any time to bring together. In other words the broker under such circumstances becomes *quoad hoc* himself a clearing house. Now, if on the day next succeeding August 3, we will say, client B orders Schwartz, Dupee & Company to close out his deal, that is to say, to *sell* 700 shares of Diamond Match stock for the account, *which the day previous he had ordered purchased*,

Schwartz, Dupee & Company would *again be brought into the clearing house*, and their balance would again be 700 shares *sold* and the 700 shares would inevitably be the 700 shares of A. In other words, the purchaser of A's shares, instead of being X or Y of August 1 or B of August 2, would be the purchaser of August 3, as designated by the manager of the clearing house.

Now, taking up the schedule of the various transactions for the August account, found on page 77 of the record, it appears that on July 25th, Schwartz, Dupee & Company sold to various brokers 500 shares of Diamond Match stock at $229 per share. On that day Schwartz, Dupee & Company bought no stock on the Exchange for the August account. (N. B. Please to observe that in the schedule we are referring to there is a July account and an August account which are not to be confused.)

Turn then to page 80 of the record, where there is found a schedule of the transactions of Schwartz, Dupee & Company on July 27th for the August account. It there appears that for the four brokers to whom Schwartz, Dupee & Company had sold the 500 shares on July 25th, there were substituted two brokers. Schwartz, Dupee & Company in addition to this substitution of the previous 500 shares also made original purchases and sales for the August account. They sold 350 shares to Mr. Peters at $229 per share, and they also bought 350 shares from Mr. Peters at the same figure. The 350 shares sold were for two clients of Schwartz, Dupee & Co. One of these clients was the complainants to the extent of 200 shares. The other 150 shares were for some other client of Schwartz, Dupee & Co. The 350 shares bought on July 27th were for still another client of Schwartz, Dupee & Company, whom we will call X.

See page 89 of the record, where the stipulation provides as follows:

"That the 500 shares sold on July 25, 1896, by Schwartz, Dupee & Company, for the 'August account,' *was sold for the account of Clews & Company*, the complainants; that 200 shares of the 350 shares, sold July 27, 1896, by Schwartz, Dupee & Company, for the 'August account,' *were also sold on account of complainants;* that all of the other sales made by Schwartz, Dupee & Company, for the 'August account,' were made on behalf of other clients than the complainants."

Schwartz, Dupee & Company having bought as much as they sold, of course the total amount they were short in the clearing house at the close of business on July 27th, would not be affected by their transactions that day and they still had a balance of 500 shares sold in the clearing house.

Turn next to page 81 of the record and it appears that on July 28th, another substitution has been made for the 500 shares Schwartz, Dupee & Company had sold for the August account. On that day they also sold 750 shares of the stock for four different clients. See again stipulation page 89 of the record which provides:

"That the 750 shares sold by Schwartz, Dupee & Company, on July 28, 1896, were sold for four different clients of Schwartz, Dupee & Company; for one to the amount of 50 shares, for another to the amount of 300 shares, for another to the amount of 350 shares, and for another to the amount of 50 shares."

One of the clients was Mr. X to the extent of 350 shares; this sale balances the purchase for Mr. X of the same amount of shares on the 27th of July and he then dropped out of the account. *Schwartz, Dupee & Company had purchased and sold the same amount of stock for the same client.* One transaction balances the other and of course it was the intention thereby to close out such a client. See again page 89, where the stipulation provides:

"That the client for whom Schwartz, Dupee & Company bought the 350 shares on July 27th *is the same person* for whom they sold 350 shares on July 28th, and who sold *in order to close his purchase of July 27th.*"

The other clients in the sale of July 28th were as follows: One for 50 shares; one for 300 shares, and one for 50 shares. The balance then, which Schwartz, Dupee & Company had sold for all their clients at the close of business on July 28th, was 1250 shares.

Turn now to pages 82 and 83 of the record and we find that these 1250 shares were substituted for other contracts on July 29th, and that on the latter day Schwartz, Dupee & Company also sold 150 shares and purchased 300 shares. The 300 shares purchased were for a client whom we will call Mr. W, and who is the same client for whom Schwartz, Dupee & Company sold the 300 shares on July 28th. See again page 89, where the stipulation provides:

"That the client for whom Schwartz, Dupee & Company sold 300 shares on July 28th *is the same person* for whom Schwartz, Dupee & Company bought 300 shares on July 29th, and said purchase of July 29th was made to cover said person's sale of July 28th."

At the close of business on this day, Schwartz, Dupee & Company had sold 1,100 shares for their various clients; they had no clients who were then purchasers for the August account; they had then contracts sufficient to supply all their clients who were sellers for the August account.

Turn next to the middle of page 84 and the schedule of Schwartz, Dupee & Company's transactions for July 30th is found. It appears from this that the 1,100 shares which Schwartz, Dupee & Company had sold were carried into the clearing house for July 30th, and that substitutions of other brokers were made therefor. Schwartz, Dupee & Company on that day had neither any sales nor any purchases,

and their balance was the same as on the previous day. They had no new clients, either purchasers or sellers.

Turn next to page 85 and the schedule of Schwartz, Dupee & Company's transactions for July 31st is found. On that day other brokers were substituted for the contracts in the total amount of 1,100 shares sold, which Schwartz, Dupee & Company carried into the clearing house. There were no additional sales or purchases on said day and the balance remained the same, to wit, 1,100 shares.

Turn next to page 86 of the record and it is found that the 1,100 shares brought into the clearing house on August 1st, had appeared with still other brokers substituted therefor. On this day Schwartz, Dupee & Company sell for the August account fifty shares for another client. This added to the previous sales made a total amount of contracts of sale outstanding, 1,150 shares; and this amount would be carried into the clearing house on the next business day, to wit, August 3d.

On August 3d, the manager of the clearing house substituted Jamieson & Company as purchasers of these 1,150 shares, and the manager of the clearing house notified Schwartz, Dupee & Company of the substitution. See page 42 of the record. He also notified Jamieson & Company of this substitution. See page 42 of the record. The parties being so notified ratified the substitution by exchanging trading cards with each other. These trading cards are copied at page 44 and are identified elsewhere.

The following schedule shows all the purchases and sales made by Schwartz, Dupee & Company for the August account.

PURCHASES AND SALES FOR AUGUST ACCOUNT
By SCHWARTZ, DUPEE & Co.

Record.	*Date.*	*Bought.*	*Sold.*	*Daily balance sold.*
p. 77	July 25	none	500 for Clews	500
p. 80	" 27	350 for X.	200 for Clews	
	" 27		150 for A	500
p. 81	" 28	none	50 for B	
	" "		300 for W	
	" "		350 for X	
	" "		50 for D	1250
p. 83	" 29	300 for W.	150 for E	1100
p. 84	" 30	none	none	1100
p. 85	" 31	none	none	1100
p. 86	Aug. 1	none	50 for F	1150
		650	1800	
			650	
			Bal. sold	1150

Carrying the summary a step farther, it appears that Schwartz, Dupee & Co.'s sales for August account were as follows:

For Clews & Co.		700	
"	A	150	
"	B	50	
"	W	300	(canceled by purchase.)
"	X	350	" " ")
"	D	50	
"	E	150	
"	F	50	

Their purchases were for W 300; for X 350, canceling the sales for those persons, and leaving the only clients interested,

the complainants, together with A, B, D, E and F *in the amounts respectively shown*, being a total of 1,150 shares sold, which was carried into the clearing house on August 3d, and the manager authorized to substitute as the purchaser thereof any broker or brokers who had bought that amount. It appears from the clearing house sheet of Jamieson & Co., at p. 87, that they were purchasers of 1,150 shares, and the manager brings Schwartz, Dupee & Co. and Jamieson & Co. together as seller and purchaser and each firm is satisfied and in writing ratifies the contract thus made by their common agent.

BECKHUSON AND GIBBS V. HAMBLET.

The case of *Beckhuson and Gibbs* v. *Hamblet*, L. R. Q. B. Div., Vol. 2, p. 18, cited by counsel (Brief, p. 57), was a case at law and technically reasoned. According to the doctrine of this case if broker A says to broker B, "I have three orders for the purchase of Louisville shares; one for 100, one for 200 and one for 400—total, 700 shares; can you let me have them?"—and a bargain is struck; now, if a contract is first made for 100 shares, which broker A mentally assigns to his first client, and then immediately afterwards another contract is made for 200 shares, which broker A mentally assigns to his second client, and then still another contract is made for 400 shares, which broker A mentally assigns to his third client, there would be a privity of contract between each of the clients and broker B, upon which the client could sue as the undisclosed principal of broker A. But if the contract between the brokers is for 700 shares in a lump, which broker A apportions among his clients, there would be no privity of contract between the undisclosed principals and broker B, even if all parties

concerned had consented to a general custom sanctioning the transaction.

This strikes us as a distinction with very little difference, and as a fair specimen of the metaphysical reasoning of the old common law. But if such be the rule at *law*, it furnishes reason sufficient for a resort to *equity*, where the only inquiry is, Who is the real party in interest and fairly entitled to the fruits of the particular contract?

As a justification of our standing in equity we would respectfully add to the cases of *Phillips* v. *Edsall*, 127 Ill. 535, and *Chapman* v. *Shattuck*, 3 Gilm. (Ill.) 49, cited in our principal brief (p. 102), the case of *Beckhuson and Gibbs* v. *Hamblet*.

The Public Sale.

Counsel for respondents frequently refer to petitioner's sale of the 700 shares of Diamond Match stock at public auction as a *fictitious* sale. (See brief for respondents, Jamieson & Company, p. 71.) But this assertion is not well founded. When, on the 3d day of August, 1896, the shares of stock were tendered to Jamieson & Company by Schwartz, Dupee & Company, the title to the shares then and there, *eo instanti*, became vested in Jamieson & Company. (See our principal brief, p. 87, and authorities cited.)

When the shares of stock were offered at public auction they were offered *as the property of Jamieson & Company, and sold as such*. In conducting the sale petitioners acted as *quasi* agents of the respondents, Jamieson & Company. The relationship between them did not have the fiduciary qualities of an actual agency, but was, according to the authorities, a somewhat analogous relationship. The petitioners became the purchasers of the shares of stock at their own sale. This is the sum and total of their offending. That there

was any misconduct in *fact* is not pretended; that the sale resulted in any injury to the respondents is not pretented. On the contrary, the price bid for the stock by petitioners was the highest price offered, and therefore was of greater advantage and benefit to the respondents than would have been the case had petitioners awaited the opening of the Exchange.

The sole object of the sale was to furnish evidence of market value. The original bill in this case charged a conspiracy to "kite" the value of Diamond Match stock for the purpose of unloading on the public. It is notorious that the balloon bursted, and that the Chicago Stock Exchange was closed in consequence. The bids received at a public auction sale, duly advertised, would afford *prima facie* evidence of *actual* value, and the sole purpose of the sale, we repeat, was to provide such *evidence.*

Mr. Sedgwick, in his Work on Damages, 8th Ed., Vol. 2, Sec. 755, says:

"It is often said that where the vendor resells the property, the difference between the price obtained at the resale and the contract price is absolutely the measure of damages; or more exactly, the difference between the net proceeds of the resale (the price obtained less the expense) and the contract price. But in other cases, it is *more properly held* that the price obtained at the resale is only *evidence* of the market value."

In addition to the evidence afforded by this resale we have the bids offered for the stock on the re-opening of the Exchange, from which, it appears, that the price bid by petitioners for the stock was an adequate price and the fair value of the stock at the time. The respondents, Jamieson & Company, have made no attempt whatever to show to the contrary, nor have they attempted to set aside the sale by offering to redeem the stock at the contract price.

PETITIONERS ASSUMED IGNORANCE OF THE RULES AND CUSTOMS OF THE CHICAGO STOCK EXCHANGE.

In arguing the proposition that, to be binding, contracts must be *mutual*, and that the custom of substitutions in vogue on the Stock Exchange were not known to the petitioners, not assented to by them, and *therefore*, not being binding upon them, failed to bind the respondents, counsel have involved themselves in perplexing logic. We can understand how a *defendant*, being sued upon a contract different in terms from the one he expressly authorized, but nevertheless sought to be holden on the ground of a custom assented to, might be permitted to plead ignorance of such custom. Such was the case of *Irwin* v. *Williar*, 110 U. S. 499, cited by counsel for respondents, Jamieson & Company (See brief, pp. 48 to 51).

But we venture to affirm that nowhere in all the books can a case be found where a defendant has escaped liability on a contract, entered into by him, on the ground that the *plaintiff* was ignorant of the customs which resulted in the making of the contract. Expressed in plain words the contention of Jamieson & Company amounts to this:

"We, being members of the Chicago Stock Exchange, were perfectly familiar with all its rules, customs and regulations, and entered into the contract of August 3d in view of and with full knowledge of such rules and customs. But it is very evident that Clews & Company were not familiar with such rules and regulations, can not be presumed to have assented to them, *and therefore we are not bound!*"

And yet, almost in the next breath, counsel contend that the transaction was had on the Chicago Stock Exchange *subject* to the rules, customs and regulations of that Exchange which provided an exclusive remedy for all breaches of

contract, and that the petitioners, *having contracted with reference to such rules*, must look to such remedy.

But what evidence is there in the case that Clews & Company were ignorant of the rules and customs of the Chicago Stock Exchange, or that they did not contract with reference to such rules? By authorizing the sale upon the Exchange the law *presumes* they were acquainted with its customs. Is there any evidence to overthrow this presumption? On the contrary, every telegram passing between Clews & Company and their brokers, Schwartz, Dupee & Company, manifests the utmost familiarity with the rules and customs of the Chicago Stock Exchange, and the course of dealing in the clearing house of that institution.

We have pointed out in our principal brief that when Clews and Company ordered a sale " for the account " they must have known that the sale would take place on the Chicago Stock Exchange, and through its clearing house; *for, disassociated from the Stock Exchange, the words " for the account " have no significance whatever.* But interpreted with reference to the Stock Exchange, they are pregnant with meaning. In them are packed all the rules, usages, regulations and consuetudinary law of that institution.

Respectfully submitted,

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2523

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Clerk

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Br. of Tenney for Respondents

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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1899.

HENRY CLEWS, CHARLES M. FOSTER and JAMES B. CLEWS,
Petitioners,
vs.
MALCOLM M. JAMIESON, ROLAND C. NICKERSON, HARRY F. BILLINGS et al.,
Respondents.

Petition for Certiorari.

BRIEF FOR RESPONDENTS.

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2524

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vs.

MALCOLM M. JAMIESON, ROLAND C. NICKERSON, HARRY F. BILLINGS et al., *Respondents.*

Petition for Certiorari.

BRIEF FOR RESPONDENTS.

We have examined in vain the petition and brief of the petitioners for the statement of a single legal proposition, or a single phase of this case, which distinguishes it from the general mass of litigation in which the questions involved are of permanent interest only to the parties themselves. The case is one of very practical interest to the parties, but that interest is not, as counsel seem to imagine, one which is shared by the stock exchanges of the world, nor by the members of those exchanges, who daily transact business under rules and customs essentially different from those which are described in the record of this case. Indeed, even the construction of the rules and customs of the Chicago Stock Exchange has ceased to present a question of more than academic interest. For the rules and system of trading which gave rise to this case have since been abolished.

The case is, in our view, one whose extreme simplicity,

in point of law, does not require for its solution any incursion into the general fields of literature, either legal, poetic or economic. And, not having felt that mistiness of apprehension of the effect of these transactions, which counsel, in the concluding paragraph of their brief, say embarrassed their own efforts, until they had examined the English cases, we shall not attempt to follow the line of discussion which they have adopted. The statement that the contracts of sale daily made on the Stock Exchange—contracts which are made verbally and in a moment, by men who have themselves made the rules governing their execution—have in them some element of weird mystery, which makes it difficult for even a trained lawyer to understand their effect, would certainly suggest an inquiry as to why the laymen, who make the contracts, experience so little trouble in practically operating under them.

Summarizing the petitioners' claim, it is that they made with Jamieson & Co. a contract for the sale of 700 shares of Diamond Match stock; that Jamieson & Co. refused to take the stock when tendered, whereupon Clews & Co. sold it at a lower price, and seek to recover the difference. This is clearly the statement of a legal claim for unliquidated damages; and the theory of equitable jurisdiction must be sustained, if at all, upon the fact that a fund was deposited by Jamieson & Co. in the Stock Exchange as security for the performance of the contract. This fund is concededly much less than the amount of the petitioners' damages, and, as Jamieson & Co. are admitted to be abundantly solvent, there would seem to be no doubt that the legal remedy was amply adequate to the protection of all of the petitioners' rights. This objection was specifically pleaded in the answer to the amended bill. (*Record, p. 75.*)

But, turning from the question of the forum to the question of the parties' rights, the first proposition which naturally claims attention is the one on which the Court of Appeals decided the case; that is, the question whether, assuming that these parties actually entered into a contract with each other—an assumption which the decision of the Circuit judge completely refutes—the contract was void under the laws of Illinois with reference to gambling contracts.

Upon this question we have nothing to add to the review of the evidence and authorities contained in the opinion of the Court of Appeals. Certainly the whole theory of the case upon which opposing counsel rely to sustain the statement that these parties contracted with each other, confesses and demonstrates that they contemplated settling it by the payment of differences, and not by the delivery of property. The machinery of the Stock Exchange Clearing House, the method of settling the daily balances between brokers through its medium, the rules providing for this method of settlement, the actual resort to that clearing house method by Schwartz, Dupee & Co., in these transactions, and the fact that it is only through this machinery, which is designed for the settlement of contracts by the payment of differences, that the petitioners can make out their theory of the existence of any contract with respondents, all tend to sustain the view of the Court of Appeals.

It is perfectly true, as counsel say, that the defense of illegality was not pleaded in the answer. We think, however, that it will be time enough to consider that technical objection when some court repudiates the old principle that the enforcement of an illegal contract would be refused by a court, in the assertion of its own dignity, even

if the defendant consented to waive the defense. It certainly would furnish no reason for granting a *certiorari*.

Judge Grosscup, who decided the case in the Circuit Court, held that there was no contract at all between Clews & Co. and Jamieson & Co. A consideration of the successive steps which it is claimed created the contract, both as they are stated in the bill and in the evidence, will, we submit, show that his view of the case was correct.

The allegation of the contract in the amended bill is that in July, 1896, the petitioners ordered their brokers, Schwartz, Dupee & Co. to sell, for delivery on August 31, 1896, *700* shares of Diamond Match stock; that on August 3, 1896, Schwartz, Dupee & Co. sold to Jamieson & Co. *1,150* shares, deliverable on August 31st, at $222; that this sale was made by Schwartz, Dupee & Co. in their own name, but as to 700 shares they acted for the complainants, and as to the other 450 shares they acted for other clients. (*Record p. 63.*)

It will be noted, therefore, that the bill proceeds upon the theory of a single transaction for the complainants, involving just 700 shares; and it will be noted further that, while the bill does not allege at what price Schwartz, Dupee & Co. were directed to make the sale, its allegations clearly mean, and are intended to convey the impression, that the alleged sale of August 3, of *1,150* shares at $222, was the one which Schwartz, Dupee & Co. made in fulfillment of the order. So that the theory of the bill is of an order to Schwartz, Dupee & Co. to sell 700 shares, which was fulfilled by them by a sale at $222, this sale being a part of an entire contract for 1,150 shares.

We call the court's attention to this, the fundamental theory of the bill, because it *is concededly not true*. Turn-

ing now to the actual, admitted facts, we find that there never was a single transaction for 700 shares, even between complainants and their own brokers, but that the matter of 700 shares was itself made up of two wholly separate and distinct contracts. The first of these was a sale by Schwartz, Dupee & Co., on July 25th, of 500 shares at $229. This was in accordance with a telegraphic order of that date, and they reported to Clews & Co. the sale at that figure. (*Record, p. 41.*) (These sales made in July for August delivery are called in the evidence "sales for the second account," *i. e.*, for delivery during the month following the order.) The other 200 shares was a separate sale, on July 27th, at $229, reported on the same day by Schwartz, Dupee & Co. to Clews & Co. (*Record, p. 42.*) So far as Clews & Co. were concerned, it is clear that these were two separate transactions—one of 500 and one of 200 shares—that they were informed that their orders were filled, and of the prices at which the contracts of sale had been made.

It is admitted that neither of these sales produced a contract, either between Schwartz, Dupee & Co. or Clews & Co. and Jamieson & Co. The sale of the 500 shares, as shown by the account of Schwartz, Dupee & Co., was to four different brokers for different amounts, all of them aggregating 500 shares, of which Jamieson & Co. bought only fifty. (*Record, p. 77.*) An examination of the account of Schwartz, Dupee & Co. on July 27th, the date of the sale of the 200 shares, will show clearly that, if it can be considered as an actual transaction at all, it was canceled on the same day. For the only sale made at $229 (the price at which they reported to Clews & Co. they had sold the 200 shares) was a sale to *R. A. Peters,* which was canceled by a purchase from him of the same amount at the same figure, thus wiping that transaction out entirely;

and Schwartz, Dupee & Co. treated it in their clearing house statement as being canceled. The other sales of that day were not original transactions at all, but were substitutions from prior days, and were at $228. And there was no sale at all to Jamieson & Co. (*Record, p. 80.*)

It is obvious that, thus far in the transaction, Jamieson & Co. had not become bound for either 500 or 200 shares; for they were not the persons to whom the stock was sold; and they concededly did not come into the transaction as parties to any contract involving more than fifty shares until August 3rd. Now, in the meantime, all of these substitutions took place between the brokers, the effect of which was that the brokers each day settled between themselves by offsetting their purchase and sale accounts with each other. Without following the mere book-keeping chain of these two items of 500 and 200 shares through the account to the subsequent dates, it will be sufficient, we think, to say that, from the very nature of the transaction, it was not contemplated that the new contracts, which were daily made in substitution—between the brokers—of the contracts of the previous day, made new contracts *for any of their principals,* or changed their liability. This is expressly stated in the written stipulation of facts in this case, from which we quote:

> "These transactions (the original contracts made by the brokers for their clients), so far as the different principals are concerned, were not settled or canceled by any of the substitutions, nor by any of the settlements between the brokers, except so far as when one client or principal of a broker was, through such broker, both a purchaser and a seller. In other words, the settlements by substitution or otherwise, through the clearing house, were merely settlements between the members of the Stock Exchange, and were not settlements or cancellations of the contracts

between the principals whom the brokers represented, and the brokers themselves, except where the same broker had both purchased and sold for the same client." (*Record, p. 89.*)

Now the result of this seems to us clearly to be this: On July 25th and on July 27th Clews & Co., through Schwartz, Dupee & Co., made contracts for the delivery on August 31st of 500 and 200 shares of stock, at $229. These contracts are admitted to have remained unaffected, so far as Clews & Co. were concerned, by the subsequent clearing house proceedings. They, therefore, could never be held by any one to a liability on those contracts at any other price than $229; nor, on the other hand, could they enforce the contracts, except according to their terms.

Who was the other party to those contracts? Concededly it was not Jamieson & Co., and it is perhaps unnecessary for the purposes of this case to go further in determining who it was. But it clearly was the person or persons represented by the other broker to whom the stock was first sold, and it is conceded by the stipulation that the liability of the principal or principals whom that broker represented was unaffected by the subsequent substitutions, and that the rights and liabilities of Clews & Co., on the other side, also remained unaffected.

The result of this is that the only contracts which Clews & Co. made were those of July 25th and 27th for 500 and 200 shares at $229; and those contracts the bill does not seek to enforce, but, in effect, to repudiate. As a mere question of pleading, it is plain that the complainants could not recover on a different contract from that which they alleged in their bill, to say nothing of their right to recover on a theory opposed to that set out in the bill.

The question in this case is, of course, not whether

Jamieson & Co. were liable to Schwartz, Dupee & Co., on the substituted contract of August 3rd, nor what their liability was, but whether they were liable to Clews & Co. Inasmuch as Clews & Co. concededly still stood upon their original contracts at $229, which were unaffected by the substitutions, that fact alone would seem to answer any contention that they were either parties to the substituted contract, or secured any rights under it against Jamieson & Co. But, waiving that question, is it not plain that if Jamieson & Co. were seeking to enforce this contract against Clews & Co., they must, upon the conceded facts, surely fail? That substitution either made a contract for 1,150 shares, or it made no contract whatever. Jamieson & Co. were entitled to receive and were compellable to receive 1,150 shares; no more, no less, and at $222; no more, no less. The obligation of delivery on the other side was simply reciprocal. Therefore, if Clews & Co. were parties on one side of that contract, they could be held liable upon it according to its terms; and that is to say, that they were liable to deliver 1,150 shares at $222, and that this liability could be enforced against them.

Of course, in this case there was a profit to them in the fall in the price, and the mysterious disappearance of this profit is one of the elements which go to show that no contract was made between the different principals by these substitutions. But, waiving that, the theory that Clews & Co. entered into a different contract each day that a substitution was made, of course, carries with it the necessary concession that they would be liable upon that contract if the market had gone the other way. So that it is an essential part of the complainant's theory that if this stock had gone up to $250, Clews & Co. could not only have been

held liable by Jamieson & Co. for this advance price, but liable for the delivery of 1,150 shares, although they had contracted to deliver only 700 shares, and that at $229.

This theory involves this further patent absurdity: As all of the trades which Schwartz, Dupee & Co. had for all their customers in Diamond Match for the August account went each day into the settlement in the clearing house, which resulted in the substitutions of the following day, all were interested as parties in the resultant substituted contracts; and, in effect, the result would be that all the clients of Schwartz, Dupee & Co. became liable each day upon the changing clearing house balance which that firm had in Diamond Match for the August account. The changing balances in the clearing house might some day make Schwartz, Dupee & Co. short, sometimes long; they would sometimes be buyers for such an amount that their seller contracts would be either wiped out, or be for so small an amount that they would not aggregate in all 700 shares.

And yet the theory of the petitioners is that, through all these manifold changes, designed only for settlements between brokers, there ran some definite kind of an arrangement which was ultimately to make Clews & Co. liable upon whatever balance remained on any particular day, as the result of these settlements. It seems to us a perfectly plain proposition that such a result could not have been produced by two simple orders to a broker to sell 500 and 200 shares at $229, and a report from him to his principal on the same day that he had executed the order according to its terms.

Turning now from the questions which affect the formation of the alleged contract between Clews & Co. and Jamieson & Co., let us look to the performance of it.

The contract was unquestionably an entire one, for the sale and delivery of 1,150 shares, and it is so alleged in the pleadings. The complainants further alleged that the tender to Jamieson & Co. was of 1,150 shares. In effect, the complainants are now claiming upon a contract for 700 shares, and upon the theory that Jamieson & Co. were in default for not accepting that number. Yet it is conceded that there never was a tender to Jamieson & Co. of 700 shares, and after Clews & Co. notified Jamieson & Co. that they were the interested parties in the transaction, they made no new tender of fulfillment of that part of the contract of which they sought performance.

Now, as to the sale which was made by the petitioners for the purpose of fixing the amount of their damages. This sale is of importance only as a means of fixing the measure of the liability of Jamieson & Co. upon the theory that they had made a contract of purchase and had refused a lawful tender of the stock.

Waiving the question for the present whether a lawful sale could be made, except upon the exchange in accordance with its rules, this sale was a mere fiction. These are the facts: Clews & Co. did not have this stock to offer for sale. They did not buy it from Schwartz, Dupee & Co. for the purpose of making a sale. They merely borrowed from Schwartz, Dupee & Co. 700 shares to offer at the sale, agreeing that if any one took it, they would replace the stock; otherwise they would simply return that which they borrowed. Now it is conceded that no one did buy the stock; that it was simply handed over to some one who paid no money for it, and who handed it right back to Schwartz, Dupee & Co., in accordance with the agreement. It was not a statement of a conclusion, but a simple statement of the transaction, when Mr.

Comstock, the petitioners' witness, said: "The stock all the time was the property of Schwartz, Dupee & Co., both before and after the 22d of September,"—the date of the sale. (*Record, pp. 155-6.*

When it is remembered that a *bona fide* offer of $135 was made for 200 shares of this stock at the sale, the inequity—not to say iniquity—of using a sale of this kind, which did not pass anything to any one, as a means of measuring the defendants' liability, is very apparent.

Aside from the fact that the petitioners made this fictitious sale, and are relying on it to make out a cause of action in a court of equity, they do not show performance of the contract, even if it had been a genuine one.

If a contract was made between the parties, then it is admitted to have been one of which the rules of the exchange formed a part. A liability under it could therefore arise only when those rules had been followed.

Those rules provide a specific mode of settling and ascertaining the amount of the damage which has been caused by a default in such a contract.

Article 17 of the by-laws of the Exchange (*Record, p. 37-8*) provides that should any member neglect to fulfill his contract on the day it became due, the party contracting with him should, after giving notice, employ an officer of the board to close the same forthwith, in the exchange, by purchase or sale, as the case might be.

It is further provided, that if the creditor fails to close the contract by this method, then that the price should be fixed by the price current at the time such contract should have been closed, under the rule.

The plain object of this rule was to prevent any unfairness which might result from offering the stock

for sale on the street, or at some place where men were not in the habit of meeting for the purpose of buying or selling stocks. A sale on the exchange would, where buyers are always present, surely produce the fair value of the stock, and it was within the power of the parties, and plainly to their mutual interest, to provide a mode of conducting the sale which would furnish the legal means of ascertaining the amount of damage occasioned by the failure to accept the stock.

If our view of the contract is correct, and Jamieson & Co. were entitled to have the amount of their liability fixed by a sale on the exchange, or by the price then current, as the rules provide, then no right of recovery was shown. For no attempt was made by the petitioners to comply with the rule. On the contrary, during a mere temporary closing of the exchange, they made this fictitious sale, and filed their bill to collect the damages which they claimed to have thus fixed.

We submit that the decree dismissing the bill for want of equity was a just determination of the case, that no cause has been shown for reviewing the decision by *certiorari,* and that the petition should be denied.

SAMUEL P. MCCONNELL,
HORACE KENT TENNEY,
Counsel for Respondents.

2524

No. 245

Br. of Hamline for Respondents

Office Supreme Court U.S.
FILED
APR 9 1900
JAMES H. McKENNEY
Clerk

Filed April 9, 1900.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1899.

HENRY CLEWS et al.,
Petitioners,
vs.
MALCOLM M. JAMIESON et al.,
Respondents.

PETITION FOR CERTIORARI.

REPLY OF EDWIN G. FOREMAN ET AL., RESPONDENTS, COMPRISING THE GOVERNING COMMITTEE OF CHICAGO STOCK EXCHANGE, TO THE PETITION FOR CERTIORARI.

JOHN H. HAMLINE,
FRANK H. SCOTT,
FRANK E. LORD,
SOLICITORS FOR SAID RESPONDENTS.

The Lakeside Press, Donnelley-Warren Printing Company, 53 Dearborn St., Chicago.

2524

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STATEMENT OF THE CASE.

In the above suit of *Clews et al* v. *Jamieson et al.*, the United States Circuit Court of Appeals for the Seventh Circuit, without any pleadings to suggest the same and without any argument either by appellants or appellees on that point, declared a contract entered into on the Chicago Stock Exchange between complainant's brokers Schwartz, Dupee & Co., and the defendants, Jamieson & Co., to be gambling and void. The effect of this decision is to stamp every transaction in the clearing house of said Exchange as gambling, and to brand the Exchange as a gambling house. So long as this decision stands unreversed every non-resident of the Northern Division of the Northern District of Illinois who deals on said

Exchange may go into the Federal Court and avoid his contract, and every broker of the Chicago Stock Exchange must wear the badge of a gambler. A decision so drastic, so sweeping, which affects commercial exchanges all over the country and renders insecure contracts running into millions of dollars, should not be pronounced much less permitted to prevail until argument has been first heard thereon. It is immaterial to this defendant whether the complainant or its co-defendants prevail in this suit. But it is of the highest importance to the commerce of this country that the check placed by this decision on the quick and free transmission and interchange of the property of this country represented by stocks in corporations be swept away. It is of vital importance to the prosperity if not the actual existence of the Chicago Stock Exchange that its clearing-house system be maintained. For this reason this defendant joins the complainant in asking that a writ of *certiorari* do issue in the above entitled cause, that this question may be fully investigated and finally determined by this court. As is usual with a court that attempts to decide a point that has not been made in the pleadings, without inviting or having heard argument thereon, the opinion of the lower court is based upon an entire misconception of the facts. That this court may fully understand the question involved we will state the facts somewhat in detail.

During the year 1896, and for a long time prior thereto, defendants Schwartz, Dupee & Co., brokers in stocks and bonds in Chicago, and members of the Chicago Stock Exchange, were the Chicago correspondents of complainants, Clews & Co. (Rec., 112.) Clews & Co., stock brokers of New York, were in turn the New

York correspondents of Schwartz, Dupee & Co. (Rec., 114.)

The defendant the Chicago Stock Exchange is a voluntary association of brokers, organized for the purpose of furnishing a Chicago market for stocks, bonds and other collaterals listed on that Exchange. Local stocks, bonds and securities have their sole market on the floor of said Exchange. (Rec., 121.) This market is conducted in the following manner: At ten o'clock in the forenoon of each business day Joseph R. Wilkins, the chairman of said Exchange, calls off the official printed list of securities, stocks and bonds, listed on said exchange, and anybody that wants to buy makes a bid, and anybody that wants to sell makes an offer. When any bid is accepted the sale made is entered by Wilkins' clerk. When that call is over an irregular call is made, which lasts until half past one. Wilkins then calls the different stocks that are in the clearing house, a description of which we will presently give, and the last price bid for a stock before Wilkins brings down his gavel is the clearing house price for that day. At two o'clock each day the Exchange adjourns. (Rec., 122, 131.) No one but members of the exchange are permitted to deal on the floor of the Exchange, and all transactions of buying and selling take place between the members thereof, the customers of the brokers being unknown in the transactions. In July and August, 1896, the Diamond Match stock was one of the stocks listed on that Exchange. (Rec., 122–123.) The defendant Jamieson & Co., were Chicago brokers, members of such exchange, Jamison being the president thereof. On the 16th of July, 1896, at 11:19 A. M., Schwartz, Dupee &

Co. in Chicago, received the following order from H. Clews & Co. in New York by telegram:

"Sell 500 Diamond Match at 220½ *for a/c.*

(Signed) H. CLEWS & Co."

On the same day at 11.35 A. M. Schwartz, Dupee & Co. telegraphed Clews & Co. as follows:

"Sold 500 Diamond Match 221⅛ *for the account.*

(Signed) SCHWARTZ, DUPEE & Co." (Rec., 117.)

The term "*for the account*" employed in these dispatches is a technical phrase, and while perfectly understood by these brokers requires expert testimony and a reference to the rules of the exchange to explain its meaning.

On the 20th day of July, 1896, at 9:23 A. M., Schwartz, Dupee & Co. received from Clews & Co. a telegram reading as follows:

"Sell 200 Diamond Match at 221 *for the account* at opening of market. They want put out at opening if possible, but it is good all day.

(Signed) CLEWS."

And on the same day at 10:08 A. M., Schwartz, Dupee & Co. telegraphed Clews as follows:

"Sold 200 Diamond Match 221½ *for the account.*

(Signed) SCHWARTZ, DUPEE & Co."

(Rec., 117.)

Wilkins, the chairman of the Exchange, whose evidence is uncontradicted, says that the term "account" means the account day or delivery day for the month of July, which is the last day of the month.

The first dispatch from Clews means that the Chicago broker should go on the floor of the Exchange and offer to sell 500 shares Diamond Match stock at 220½ or better, to be delivered and paid for and taken on the last day of

July. (Rec., 124.) But by the rules of the Stock Exchange which are in evidence all trades "*for the account*" must go through the Clearing House, so that the despatches in question in effect direct that these trades be made in conformity with the Clearing House rules.

Section 1 of the Clearing House rules states: Under the following regulations transactions may be made for "the account" in any securities listed for that purpose dealt in at the Exchange. Section 2 provides: Deliveries of cash stocks or transactions for "the account" shall be be made on the last day of each month. (Rec., 141.) The rules regulating these transactions we will call your attention to later on. Suffice it to say that these orders were made with reference to each and all of them. And they form a part of the contracts, Clews & Co. ordered made

Wilkins explains that for the purpose of allowing members who desire to have their stock trades run over from the delivery day of one month to that of the following, the practice of the Exchange provides, after the 25th of the month, for trading in what is known as the second account From that day until the day before the end of the month he calls stocks in the first account and the second account; the first account being the account of the current month and the second account the account for the month following. On the day before the last day of the month, or delivery day, the calling of the two accounts stops and a call is made solely of the account for the following month. (Rec., 124.)

On the 25th of July, 1896, at 11:41 A. M., Clews telegraphs Schwartz, Dupee & Co.

"Change the Diamond Match over to August account at 2½ per cent. If you cannot do it let us know at once.

(Signed) CLEWS."

Shortly thereafter, but on the same day, to wit: at 11:48 A. M., Clews sent another dispatch to Schwartz, Dupee & Co.:

"You sent us the difference this morning at 2½. At what difference can you do it now?

(Signed) HENRY CLEWS & CO."

On the same day, at 11:38 A. M., Clews telegraphs Schwartz, Dupee & Co. as follows:

"Change the 500 at 2 cents or better.

(Signed) CLEWS."

All this means just this: The price of 500 shares of Diamond Match at 221 would be $110,500; the interest on this amount of money if borrowed from a bank at 6 per cent. for one month would be, say, $552.50. If the buyer or anybody else who has a contract to buy 500 shares for July delivery does not want to take and pay for this stock on the last day of July, and lay out $110,500 therefore, but wants to get a month's time so as to have the delivery on the August instead of July delivery day, he is willing to pay as much interest as he would have to pay at the bank for the use of that much money for one month. But if he went to the bank he would have to put up collaterals which he might not have and would likely have to spend several days running around to get it and then might fail. Hence he is willing to pay for this extension, which he can get on the Exchange in five minutes, very much higher interest than he would pay at the bank if he could borrow that much at the bank. The carrying rate or interest charge at this time, it seems, was from $2. to $2.50 a share.

But a firm like Clews & Co. can afford to carry stocks over to get the high rate of interest buyers will pay for such extension. Clews & Co. can borrow money at the

lowest rate. If the party to whom Clews & Co. had sold it, whom we will call Z, did not want to pay for it on the July delivery day and would pay interest at $2.50 per share or even $2. a share Clews was willing to let him have the time and carry the trade, *i. e.*, not deliver the stock for another month. If, on the contrary, Z wanted the stock, but there was some third party, "A," in the market, who had bought 500 shares of "B," but did not want to pay for it until the next delivery day, then Clews' broker would buy of "A," at the market price, his right to such 500 shares, get an order from "A" on "B" to deliver the shares to Z, and in turn sell back to "A" for August delivery the 500 shares which were originally sold to Z, at the market price plus the interest. In other words, with the consent of all parties, and by this process of buying and selling back Clews & Co. would substitute "A" in a new trade for Z. To get this interest or carrying charges the dispatches of July 25 were sent by Clews. The $2.50 and $2 spoken of in the dispatches is not commissions nor differences in settlement of stocks, but, as Wilkins testifies, is interest, pure and simple, or carrying charges. (Rec., 125.) It differs in no way from the interest the buyer would have to pay if he went to the bank and got the use of the money represented by the stock for thirty days. It depends in no way on the price of the stock, and in no way represents or marks the difference between what the stock was originally contracted to be sold for and the market price at the day of the turn over, but is dependent on the money market, which, in the middle of the Bryan campaign, was very high.

The first dispatch on July 25th notifies the Chicago brokers that Clews wants them to find somebody who will

pay interest at 2½ per cent. for Clews carrying over 500 Diamond Match. The second dispatch recognizes that Schwartz has notified him he can get 2½ per cent., or the difference between what Clews would pay "A" for his 500 shares and what he would turn around and sell his stock back to him for August delivery, and Clews wants to know what interest he can get at the hour this second dispatch is sent. By the time the third dispatch was sent Clews was willing to carry it at 2 per cent. but wants better if he can get it.

The court will bear this in mind, because the lower court entirely failed to grasp this transaction and predicated its opinion that there was a gambling in differences largely on the language of Clews' three dispatches of July 25th, which related solely to interest.

In pursuance of these orders, Schwartz, Dupee & Co. did on July 25th go in and buy in 500 shares of stock for Clews at 227, evidently the current price that day; and did at once turn around and sell it back to the same party at the same price, plus the $2 interest for the August account, and made report of same as follows:

At 12:11 P. M., Schwartz, Dupee & Co. wired Clews:

"Bought Diamond Match 227 for the account. Sold 500 229 account 2nd.

(Signed) SCHWARTZ, DUPEE & Co."

On July 27, 1896, at 8:55 A. M., Clews telegraphed Schwartz, Dupee & Co. as follows:

"Change 200 more Diamond Match, 2 per cent. or better.

(Signed) CLEWS."

And on the same day at 10:53 A. M., Schwartz, Dupee & Co. telegraphed Clews & Co.:

"We changed the 200 Match at 2¼ difference. Will give you prices later.

(Signed) SCHWARTZ, DUPEE & Co."

On the same day at 10:55 A. M., Schwartz, Dupee & Co. telegraphed Clews as follows:

"Bought 200 Matches 226¾. Sold 200 2nd account 229." (Rec., 118.)

The difference spoken of is the difference between the market price and the market price with carrying charge or interest added. The two points on the 500 shares and 2¼ points on the 200 shares, which were changed over to August account, the court will keep steadily in mind is simply the interest the broker of the man who had bought for July delivery was willing to pay to Clews, who had sold for July delivery, in consideration of Clews changing his sale to 2nd account or August delivery As Mr. Wilkins puts it, "It is what one broker who has 500 shares of stock that he is carrying for a customer and that customer is not prepared to take it up and he is perfectly willing to pay whatever anybody else who is on the other side of the market will do it for for carrying it for thirty days." (Rec., 125.)

All this is Greek unless properly explained, and is something that none of us know anything about until it is explained. But Wilkins' explanation shows just what was intended by the above dispatches.

When understood, it is evident that a system by which a July seller may make a new trade with a July buyer, providing for delivery in August instead of July, whereby the seller gets interest for carrying the other's trade, has none of the qualities of dealing or settling in differences between contract and market prices and in no way resembles gambling. This transaction was not understood by the lower court, as is evidenced by its opinion. It was not explained to it, because the question was nowhere raised. The lower court at only one point vouchsafes to

advise us as to what evidence it relies on in deciding this transaction to be a gambling contract. It says:

"On its face, the correspondence between the complainants and their brokers speaks of 'sales of Diamond Match stock for July account' of inquiries for the 'difference' demanded to change to August account and of changes then ordered and reported as made by allowing the 'difference.'" (Rec., 181.)

These words, which, as we have just explained, relate to interest, the court imagined related to gambling in differences.

As Mr. Wilkins testifies that all trades made for "the account" must go through the clearing house, (Rec., 126.) we must now explain the *modus operandi* of the clearing house.

Section 12 of the rules of the clearing house require parties trading in stocks in the clearing house to deposit $10 per share par. (Rec., 143.)

Section 13 states margins deposited on trades in the clearing house shall be considered as a margin or as a part of the same under section 1 of article 16 of the by-laws of the Chicago Stock Exchange; all such margins to be deposited in the clearing house.

Section 1 of said article 16, therein referred to, provides:

"In any contract either party may call, at any time during the continuance of the same, for a deposit of $10 per share upon the par value of the securities bought and sold; and whenever the market price of the securities have changed so as to reduce the margin of said deposit either way below the $10, either party may call for a deposit sufficiently to restore the margin to $10, and this may be repeated as often as the margin may be so reduced. In all cases where deposits are called, they shall be made within one banking hour from the time of such call."

One of the most important functions of the clearing house is to see to it that the margins are kept up every day.

At the close of each day each broker who has traded in the account fills out a blank similar to the blank shown at page 87 of the record.

On this blank, under the appropriate headings, and opposite the names of the members of the Stock Exchange who regularly deal in the account, the broker sets out in the respective columns the number of shares bought or sold, and foots up the total at the bottom of the columns. These totals will show the number of shares he had bought of any particular stock in excess of the number of shares sold, and *vice versa*. In the sheet referred to on August 3, 1896, Jamieson & Co. cleared with themselves 300 of West Chicago bought against 8350 of the same sold The net balance or 8050 bought is what they held ready to have the Clearing House take charge of. This it does by bringing Jamieson & Co. together with some other party or parties in the Clearing House who have 8050 shares sold. So that such party will be the seller to Jamieson & Co. instead of the nine persons from whom Jamieson & Co. bought their West Chicago and who are released when the stock is cleared. This process is repeated daily until delivery day. On that day the party who is a buyer takes and pays for the stock of the party who is a seller in the clearing house of an equivalent amount of stock. But the seller may have sold Diamond Match as did Clews on July 25 at 229, and on account of the stock going down the buyer on delivery day may be in the Clearing House at 222 as were Jamieson & Co. on August 3d and entitled to the Diamond Match sold by Clews. In order that Clews may get this

229, every day the stock goes down the buyer who is released by the clearances before stepping out of the Clearing House must pay in the difference between what Clews sold at and the Clearing House price for that day. This is also necessary that the margins may be kept intact. $10 a share par on each side must be kept up all the time as security. The member daily sets out on his sheet under the column "Paid" the amounts of money which he should pay into the clearing house, and which the clearing house in return should pay to the broker on the other side of the trade, by reason of the stock having gone down that day. If the stock has gone up, he sets out under the heading "Collect," and opposite the name of the broker with whom he has the contract, the amount such broker should pay into the clearing house, to meet the amount he is entitled to draw out. All this has the effect to keep the margins up, as provided by article 16 of the constitution, *supra*. If this were not done then when Match went up from 221 to 229, the seller would have no security for the advance in price.

When the member gets his sheet all made out, he daily sends the sheet to the clearing house with his check for the amount that he owes the clearing house, or with a draft for the amount he is entitled to draw out of the clearing house, as the sheet may show. The manager of the clearing house, having all the sheets of the various members before him, checks them all up, and ascertains which members of the Exchange have stock sold in the account, and sets him off against a member or members whose sheets show that they have a net total of stock bought in an equivalent amount, and then makes a summary of everybody's transactons. He sends this summary, with a notice of substitution, to each member, in form similar to "Exhibit 8" (Rec.,

120), and pays the draft of the party who is entitled to take out margins. Thereupon each of the parties thus substituted sign cards similar to Exhibts 6 and 7 (Rec., 132-133), confirming the substitution, and the morning thereafter the same are put into the clearing house. This process continues until the delivery day, when the man found to be substituted in the clearing house as a purchaser takes the stock that is sold for that delivery day and pays therefor. (Rec., 121–129.) It thus appears that not only do the rules and customs of the clearing house daily furnish a party who is bound to take the stock, but daily the party thus substituted sends his card confirming the substitution and recognizing the contract.

Under these rules, when on the 16th of July, 1896, Schwartz sold 500 shares of Diamond stock for Clews at 221⅛, Schwartz, as well as the purchaser, were each obliged to put up $5,000 as margins in the clearing house. If the price of the stock went down during the next day one point, the buyer would be entitled to take it out at 220⅛. But if he did Schwartz, Clews & Co.'s broker, would not get the 221⅛ they had sold it for. The clearing house collects this point for their brokers daily, so that when the stock is delivered on delivery day, no matter what the price may then be, the seller receives then or in the interim just what he sold it for. (Rec., 129, 130.) By reason of this rule Schwartz & Co. in the case supposed would be entitled to draw $500 out of the clearing house, and the purchaser in turn be obliged to put up $500 in the clearing house, so that the margin is at all times kept good at $10,000 and the selling price protected. (Rec., 129.) During the whole month and up to the time of delivery the contract to deliver the stock is in force and the price which Schwartz, acting for

Clews, is to get for the stock remains the same. The same course was pursued with the contract that was changed over to the August account at 229. It was a sale by Schwartz acting for Clews & Co. The stock was to be delivered absolutely on delivery day. Whatever the price the stock may have been in the market on the delivery day, *Clews was to get in any event his selling price of 229* save as he may theretofore, from day to day, have gotten a part of that price through the clearing house, as hereinbefore explained, as the stock went down. The party who was to receive the stock on the delivery day may have been an entirely different party from the party who bought the stock when it first went into the account. But this new party had been substituted for the original purchaser by the convenient method of substitution provided for by the clearing house system. And all parties are bound by the substitution for such was their contract. (Rec., 127, 128.)

This proceeding is illustrated by the facts in this case. On the 3rd day of August, 1896, Jamieson & Co. had bought Diamond Match as follows: Three hundred shares from Adsit, 600 shares from Baldwin, Farnum & Co., 200 shares from A. O. Slaughter & Co. and 50 shares from Schwartz, Dupee & Co., or a total of 1,150 shares. (Rec., 87.) Schwartz, Dupee & Co. had, theretofore, sold 1,150 shares, including 700 shares that it had sold for Clews & Co.

The Stock Exchange clearing house department on August 3, 1896, sent a notice to Schwartz, Dupee & Co. (Exhibit 8; Rec., 120), showing that Jamieson & Co. were substituted as a purchaser for 1,150 shares of Match at 222. At the same time it sent a notice to Jamieson &

Co. (Rec., 86), notifying them that Schwartz, Dupee & Co. were substituted in the trades in which Jamieson & Co. had bought 1,150 shares of match at 222. Thereafter, and on the same day, Schwartz, Dupee & Co. signed the confirmation notice (Exhibit 6; Rec., 132), confirming the substitution of trades of Jamieson & Co. of 1,150 shares of Diamond Match sold to them at 222, and Jamieson & Co. in turn signed a confirmation card confirming the purchase made by them in substitution trades of 1,150 shares of Diamond Match bought from Schwartz, Dupee & Co. at 222. (Ex. 7; Rec., 133.) Diamond Match evidently went down on the 3rd of August after the clearing-house sheets were filed with the clearing house and before the confirmatory cards were signed, so that on that day's market Schwartz, Dupee & Co. were entitled to collect out of the clearing house $287.70, and Jamison & Co. were obliged to pay to the clearing house the same amount of money. As the doors of the clearing house closed that night, the confirmatory sheets and the checks and drafts for this amount never got into the clearing house.

If we assume that the clearing house had not closed on the night of the 3rd of August, and that the trades went along to delivery day, or assume that the 3rd of August was delivery day, it was perfectly plain that on such delivery day there would be a party substituted through the clearing house as a purchaser in the contract of 700 shares of Diamond Match made by Schwartz, Dupee & Co. for their principal, Clews & Co., who would be obliged to take and pay for said stock. Not only that but a party whose card would acknowledge that he was such a purchaser would come forth. But we hear the inquiry how can you claim that Schwartz, Dupee &

Co. were authorized by Clews & Co. to accept Jamieson at 222 when the stock was sold at 229? The answer is, that every day between the 25th or the 27th of July, when the stock was turned over to the August account, and the 3rd day of August, Schwartz, Dupee & Co., as the brokers of Clews, were receiving out of the clearing house the difference between 229, the selling price, and the clearing house price of that day, so that they had received prior to the 4th of August the difference between 229 and 222, or seven points, which they held for Clews & Co. So that Clews & Co., upon the 3rd of August would have received 222 plus the seven already received, or 229, the price at which Schwartz, Dupee & Co. sold their stock. *Keep this steadily in mind!*

Section 10 of the clearing house rules provides for the same rule as to notice, time and place that governs defaults in other contracts. Sec. 16 provides for settlement outside of clearing house on default (Rec., 142, 143;) while the regular rules of the exchange provide for sale or purchase of defaulted stock. (Rec., 140.) Sec. I of Article XV of the constitution provides "Any member who fails to comply with his contracts or who becomes insolvent shall be suspended." (Rec., 137.) It follows that the machinery of the exchange does not disclose any evidence that the parties did not intend to deliver the stock sold.

Under no circumstances by trading "for the account" *would Clews & Co. get more than 229*, the contract, and under no circumstances *would they get less.* So that the facts when properly understood demonstrate that there is no room to discuss the question of gambling in differences in this case.

It must be plain that the fact that the Stock Exchange

closed its doors on the night of the 3rd of August, due to a financial cataclysm in Chicago, does not in any way indicate that the transactions entered into in the account for the August delivery were not intended to be carried out just as we have described, or that the results we have described would not have followed. It certainly does not suggest that Clews & Co. did not intend to deliver the stock on the delivery day of August. This system of the Clearing House does not affect the contract at all, but merely furnishes a medium by which the brokers and their customers may transact their business cheaply, safely and expeditiously. Safely, in that the clearing house sees to it at all times that 10 per cent. margin is kept up by both sides to every contract. Cheaply, in that the customer by putting up a 10 per cent. margin may thereby buy or sell stocks for future delivery which he could not buy or sell otherwise without going to the bank and borrowing large sums of money. After it is all explained, it amounts to simply this: Clews & Co., selling in the account for August, sells to a purchaser for a price certain, which purchaser is ascertained through a system of substitutions in the clearing house. This purchaser is to pay the price at which the stock is sold less such sums as may have theretofore been received thereon out of the clearing house by Clews, and Clews' brokers are bound to and must deliver this stock upon the settlement day or be suspended from the Exchange.

The $10 a share deposited in the clearing house by both sides to the trade in question was kept good, and at the closing hour on August 3d there was to the credit of this trade $14,000. One-half of this was contributed by each party to the trade, $7,000 standing on that date to

the credit of Jamieson & Co., and $7,000 standing to the credit of Schwartz & Co. (Rec., 133.) This $14,000 is held by these defendants the governing committee of the Chicago Stock Exchange to secure the performance of the contract represented by the cards and clearing house sheets and notices of August 3, 1896. (Rec., 133.) This money is held by the Chicago Stock Exchange in trust for someone. To whom we shall pay it or whether we shall ever pay it to anyone, does not especially concern us; save that it is desirable to avoid a multiplicity of suits, if possible. We are not here to say that Clews & Co. are entitled to the $14,000, or should take nothing by their bill. But we are here for the purpose of challenging the opinion of Judge Seaman, sitting in the Circuit Court of Appeals, that trading "for the account" in the Chicago Stock Exchange is gambling. We are also here for the purpose of challenging the decision of Judge Grosscup that there is no privity between Clews & Co. and Jamieson & Co. and contracts by brokers "on the account" in the Chicago Stock Exchange cannot be enforced by or against their principals.

BRIEF.

THE CONTRACT IS NOT OBNOXIOUS TO SECTIONS 130 AND 131 OF THE CRIMINAL CODE OF ILLINOIS PROHIBITING GAMBLING IN DIFFERENCES.

The construction given by the Illinois courts to this statute must be adopted in considering this Illinois contract.

Melchert v. *American Union Tel. Co.*, 11 Fed. R., 195.
Ward v. *Vosburgh*, 31 Fed. R., 15.

If the contract violates the statute the Stock Exchange is a gambling house *per se*, and all of its brokers are gamblers.

Irwin v. *Williar*, 110 U. S., 499.

The order to Schwartz, Dupee & Co. by their correspondents Clews & Co., directing them to sell "*for the account*," authorized them to deal according to the rules and usages of the exchange governing trading "*for the account.*"

Bibb v. *Allen*, 149 U. S., 481.
Samuels v. *Oliver et al.*, 130 Ill., 79.

Irwin v. *Williar*, *supra*, is therefore distinguished.

The rules and usages of the exchange are a part of the contract.

Thorne et al. v. *Prentiss*, 83 Ill., 99.

The presumption as well as the proof is that Jamieson & Co. contracted with reference to such rules and usages.

Corbett v. *Underwood*, 83 Ill., 324.
Perrin v. *Barker*, 126 Ill., 201.

The language employed by Clews & Co. in the despatches being technical, the court must look into the usages and customs of the trade for its interpretation.

Lyon & Co v. *Culbertson & Blair Co.*, 83 Ill., 33–35.

Time contracts or options as to time of delivery do not violate the Illinois statutes.

Wolcott v. *Heath*, 78 Ill., 433–437.
White v. *Barber*, 123 U. S., 392.
Pickering v. *Case*, 79 Ill., 330.
Cole et al. v. *Milmine*, 88 Ill., 349.
Pixley et al. v. *Boynton*, 79 Ills., 351.

Section 130 explained in

Pearce v. *Foote*, 113 Ills., 228-234;
Union Nat'l Bk. v. *Carr*, 15 Fed. R., 438;
Tenney v. *Foot*, 95 Ill., 99;
Ibid., 4 Bradw. (Ills.), 594,

as applying solely to options to buy or sell with no intention of delivery but the transaction to be settled on differences.

Such contracts are undoubtedly prohibited by the statute.

Schneider v. *Turner*, 130 Ill., 128.
Pope v. *Hanke*, 155 Ill., 621.

But it must always appear that both parties had the intention that there should be no delivery, but merely a settlement of differences.

Jamieson v. *Wallace*, 167 Ill., 388, 396.
Soby v. *People*, 134 Ill., 71.
Edwards v. *Hoeffinghoff*, 38 Fed., 640.
Irwin v. *Williar*, 110 U. S., 499–598.

2525

The burden is on the party claiming the contract to be illegal to show that *both parties* intended a settlement of differences and no delivery.

Pixley et al. v. *Boynton*, 79 Ill., 351.
Scanlan v. *Warren & Co.*, 169 Ill., 142.
Rountree v. *Smith*, 108 U. S., 268.
Bibb v. *Allen*, 149 U. S., 492.

It is the duty of the court to uphold the contract unless it appears that it is an invalid one.

BREWER, J., *Bungs* v. *Hornick*, 36 Fed. R., 97.

The cases cited by the lower court do not apply to the clearing house system. A contract for stock deliverable in the future is valid though the seller has not the stock or any means of getting it save to buy it in the market.

Porter v. *Viets*, 11 Fed. Cases, 291.
Irwin v. *Williar*, 110 U. S., 499-508.

The rules of the exchange forbid option trading or fictitious contracts or failures to deliver under penalties of suspension or expulsion.

Article 15, section 1: article 17, section 1: article 29 of the constitution.
Article 4 and article 17 of the by-laws.
Section 10 of Clearing House rules. (Rec., 136-142.)

They show the parties must have contemplated actual delivery.

The fact that margins are put up is of no significance.

Union Natl. Bank v. *Carr*, 15 Fed. R., 438.
Edwards v. *Hoeffinghoff*, 38 Fed. R., 635-639.
Hansen v. *Boyd*, 161 U. S., 397, 406.

Nor the fact that the party defaulting in the putting up of margins may be sold out under the rules.

Bibb v. *Allen*, 149 U. S., 501.

Perin v. *Parker*, 126 Ill., 201, 211.

The substitution of purchasers through the clearing house is in principle no different from "ringing out" trades. This court and the Illinois courts have invariably held that such substitution does not make the contract a gambling contract.

Chicago Board of Trade—Lamsen v. *Boyd*, 161 U. S., 397-407.

Chicago Board of Trade—Clark v. *Foss et al.*, 7 Biss., 540.

Chicago Board of Trade—Ware v. *Vosburgh*, 31 Fed. R., 15.

Baltimore Exchange—Irwin v. *Williar*, 110 U. S., 499.

New Orleans Cotton Exchange—Lehman v. *Feld*, 37 Fed. R., 852-855.

II.

THERE WAS A PRIVITY OF CONTRACT BETWEEN CLEWS & CO. AND JAMIESON & CO.

The trading "*for the account*" has long prevailed on the English Stock Exchange.

Dos Pasos, Stock Brokers, 273 *et seq.*

The clearing house is but an extension of the ringing up system, and is adopted from the London and New York Stock Exchanges.

6 Eng. & Am. Ency. Law, p. 166 (2d Ed.).

The London Stock Exchange clearing house explained.
Dos Pasos Stock Brokers, 278, foot note.

The genesis of the Stock Exchange clearing house and its establishment at Frankfort, Berlin, Hamburg and London, stated in

Political Science Quarterly, June, 1893, Vol. 8, No. 2, p. 252.

The principle of substitution by clearances and the priority of contract resulting therefrom has always been recognized by the Illinois courts.

Oldershaw v. *Knoles*, 4 Bradw. (App.), 63.
Oldershaw v. *Knoles*, 6 Bradw., 325.
Curtis v. *Wright*, 40 App., 491.
Pardridge v. *Cutler*, 68 App., 569, 575.
Reibe v. *Hellman*, 69 App. Ct., 19-22.

And the fact that the ultimate purchaser may have it at a different price matters not so long as the seller gets his price then or theretofore from his predecessor in the clearing house.

Oldershaw v. *Knowles*, 6 Bradw., 325-331.

The "account" or clearing house system recognized in

Fowler et al v. *N. Y. Gold Exchange Bank*, 67 N. Y., 138.
National City Bank v. *N. Y. Gold Exchange Bank*, 101 N. Y., 595.

This system of trading in the account with substitution of buyers through rules of the Stock Exchange has met with the approval of the highest court of England.

Nickalls v. *Merry*, L. R. E. & I. App. Cases, Vol. 7, p. 530.

Cited with approval in

Irwin v. *Williar*, 110 U. S., 499.

Bibb v. *Allen*, 149 U. S., 490.

To the same effect, *vide*

Blackburn, J., in *Maxted* v. *Payne*, 6 L. R. E., 132, 147, 151, 166-180.

Hodgkinson v. *Kelly*, L. R 6 Eq., 496.

ARGUMENT.

I.

THE TRANSACTIONS IN QUESTION ARE NOT GAMBLING CONTRACTS.

The lower court in its opinion states:

"We are of opinion, however, that the transaction, as disclosed, clearly falls within the terms of the Illinois statute above cited, as interpreted by decisions of the Supreme Court of the state, and that neither the inquiry last suggested nor the sufficiency of the proof to show a wagering contract under the common law really require a decision to ascertain the invalidity of the contract thus disclosed." (Rec., 183.)

The statute referred to is set out in the opinion and consists of sections 130–131 of the Criminal Code of Illinois (1st Starr & Curtis Ann. Stat., 2nd Ed., pp. 1295–1298). These sections are as follows:

"SEC. 130. Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any such commodities, shall be fined not than $10 nor more than $1,000 or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.

"SEC. 131. All promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages, or other securities or conveyances made, given, granted, drawn or entered into, or executed by any person whatsoever, where the whole or any part of the consideration thereof shall be for any money, property or other valuable thing, won by any gaming or playing at cards,

dice or other game or games, or * by betting on the side or hands of any person gaming or by wager or bet upon any race, fight, pastime, sport, lot, chance, casualty, election or unknown or contingent event whatever, * or for the reimbursing or repaying any money or property knowingly lent or advanced at the time or place of such play or bet, to any person or persons so gaming or betting, or that shall, during such play or betting, so play or bet, shall be null and void and of no effect."

That part of section 131 within the stars was added in 1874. The remainder of the section was enacted in 1845 (Rev. Stat., 1845, p. 263, Sec. 1), and said section is almost a literal copy of the statute of 9 Anne, Chap. 14, Pl. 1-2 (1710).

Petillon v. *Hipple*, 90 Ill., 420.

Section 130, on the contrary, was enacted for the first time in 1874, and since that time has been repeatedly construed by the Supreme Court of the State of Illinois. As the contract in question was made in Illinois, and was to be performed in Illinois, and the lower court declares that it is illegal as being obnoxious to the statutes of Illinois, this court would naturally turn to the decisions of the Illinois courts to ascertain whether the contract falls within the prohibitions of the statute.

Melchert v. *American Union Tel. Co.*, 11 Fed., 195.

If the transaction in question is illegal as being a gambling transaction, every broker who is a party to the transaction engages in gambling. and all may be indicted under the criminal code.

Irwin v. *Williar*, 110 U. S., 499.

2526

Moreover, every broker who has carried on a transaction under the rules of the Stock Exchange has been engaged in gambling. All transactions carried on thereunder are void, and the Stock Exchange of Chicago is nothing but a gambling hell. Not only must this be true of the Stock Exchange of Chicago, but also of the Board of Trade of Chicago and all its members, to say nothing of the Stock Exchange of New York, the Exchanges of Boston, Philadelphia, New Orleans, St. Louis, Baltimore, and the Exchange in London. For the procedure under which the transaction in question was carried on is substantially similar to that under which property is bought and sold on the exchanges referred to. In London deliveries are twice a month, on the New York Stock Exchange and on the Chicago Board of Trade the deliveries are the next morning, otherwise the *modus operandi* is the same substantially in all these exchanges.

Not only has the Supreme Court of Illinois frequently considered the statute in question, but this court has often had occasion to consider it, and has always followed the decision of the Supreme Court of Illinois construing said statute.

This court has decided that where a principal sends an order to a broker engaged in an established market or trade for a deal in that trade, he confers authority upon the broker to deal according to any well-established usage in such market or trade, especially when such usage is known to the principal, and is fair in itself, and does not change in any essential particular the contract between the principal and agent, or involves no departure from the instructions of the principal, provided the transactions in which the broker is employed

is legal in its character, and does not violate any rule of law, good morals, or public policy.

Bibb v. *Allen*, 149 U. S., 481,

In the earlier case of *Irwin* v. *Williar*, 110 U. S., 499, the judgment of the court below in that case was reversed by this court, upon the point that the court permitted proof of the custom of the Chicago Board of Trade, when there was no evidence that the defendant below had knowledge of it. This court held that a custom which provided for exchange and substitution of contracts and payment of differences to effect it, working as it did a complete change in the nature of the seller's rights and obligations, could not be made without his assent, and that assent could be implied only in case of knowledge of the custom which it was claimed authorized it.

It is undisputed in this case that Clews & Co. knew that Schwartz, Dupee & Co. did business as brokers on the Chicago Stock Exchange, and in accordance with its rules and regulations, as they were their correspondents, and that in acting as their agents in the sale of stock for future delivery they were to transact the business in the Chicago market through that exchange, and in accordance with its rules and regulations.

It is the rule in Illinois that all contracts for sale, made on a commercial exchange, by one member thereof with another member, with reference to the by-laws and rules of the exchange, must be construed as if those rules were expressly made part of the contract, and when made at the exchange will be presumed to have been made with reference to those rules.

Thorne et al. v. *Prentiss*, 83 Ill., 99.

And where a person conversant with the rules and usages of the exchange employs a broker to make purchases for him on the exchange, such persons are presumed to contract with reference to these rules and usages.

Corbett v. *Underwood*, 83 Ill., 324.
Perrin v. *Barker*, 126 Ill., 201.

In *Samuels* v. *Oliver, et al.*, 130 Ill., 79, it was said by our Supreme Court:

"It is a general rule that a person dealing at a particular market will be taken to have dealt according to the known and general custom and usage of that market, and if he employs another to act for him in buying and selling at such market, he will be held as intending that the business shall be conducted according to such general usage and custom of such market; and it has been held to be the rule, whether he in fact knows it is the custom or not."

To the same effect *vide*,

Bibb v. *Allen*, 149 U. S., 499.

The language employed in the dispatch by Clews to Schwartz is highly technical, and without explanation from those familiar with the trade would be meaningless. Having been selected by Clews & Co., they are presumed to know its meaning. As was said by the Supreme Court of Illinois in *Lyon & Co.* v. *Culbertson & Blair Co.*, 83 Ill., 33–35.

"Inasmuch as the great mass of commercial business is transacted by men pressed by their affairs, and who are not in the habit, even if time would permit, of reducing their agreements to writing beyond a mere memorandum, the courts are compelled to look into the usages of trade or business to learn the real intention of the parties."

When Clews & Co. instructed Schwartz to sell "*for the account*" it instructed the latter to go on the Chicago Stock Exchange and make the "sale under the rules and regulations governing sales *for the account*" on that exchange. There is no question but that Clews adopted and intended to adopt such rules and regulations in making the trade in question. Neither can there be any question but that Jamieson & Co., members of the exchange, knew what dealing "*in the account*" was, nor any doubt but that they were familiar with the rules governing the same when they went into the clearing house and consented to be a buyer from the party which the clearing house coupled them with from day to day as they continued in the clearing house up to the 3rd of August, 1896. It follows that both sides to the contract made their contract with reference to the rules of the exchange governing trading in the account on the Chicago Stock Exchange and are bound by those rules and the contract made thereunder, unless such contract is illegal.

There can be no question raised in this case that the contract in question is contrary to the Illinois statute on the ground that it provides for a future delivery. It would not be obnoxious to the Illinois statute did it give to Clews the right to deliver any time during the month of July, instead of providing for delivery on the July delivery day

As early as 1875, the year after section 130 of the Criminal Code was adopted, the Supreme Court of Illinois in the case of *Wolcott* v. *Heath*, 78 Ill., 433-437, said:

"It is true, they were time contracts—that is, the seller had all of the month in which to deliver the grain; but the testimony of Wolcott is, they were *bona fide* con-

tracts for the actual purchase of the grain. The only option the seller had was as to the time of delivery. The obligation was to deliver the grain at all events, but it was the seller's privilege or option to deliver it at any time before the closing of business on the last day of the month. Time contracts, made in good faith for the future delivery of grain or any other commodity, are not prohibited by the common law, nor any statute of this state, nor by any policy beneficial to the public welfare. Such a restraint would limit commercial transactions to such a degree as could not but be prejudicial to the best interests of trade."

In *White* v. *Barber*, 123 U. S., 392, this court said, with relation to a case growing out of a transaction on the Chicago Board of Trade:

"A *bona fide* contract for the actual sale of grain, deliverable within a specified future month, the only option with which is the option in the seller to deliver it at any time within such month, is not a gambling contract within the meaning of section 130, chapter 38, of the Revised Statutes of Illinois."

Mr. Justice Blatchford delivered the opinion of the court, in the following language:

"The only question involved in the suit at law is as to the correctness of the charge to the jury in the particulars specially excepted to. The proper construction of the statute of Illinois, Sec. 130 of Chap. 38 of the Revised Statutes, was determined by the Supreme Court of Illinois in *Wolcott* v. *Heath*, 78 Ill., 433, in the passage from the opinion in that case quoted by the Circuit Court in its charge to the jury. According to that construction, the contracts for the sale of No. 2 spring wheat deliverable in July, 1882, made by Barber, were not void as gambling contracts, if they were *bona fide* for the actual sale of grain, and if the only option the seller had was as to the time of delivery, the obligation assumed by Barber being to deliver the grain at all events, with the option only to deliver it at any time before the close of business on the last day of July, 1882."

The construction given by the Supreme Court of Illinois in the case just cited has never been changed by that court.

In *Pickering* v. *Cease*, 79 Ill., 330, the same language was employed. See, also, *Cole et al.* v. *Milmine*, 88 Ill., 349; *Pixley et al.* v. *Boynton*, 79 Ill., 351.

The true intent of section 130 has often been stated by the Illinois court.

In *Pearce* v. *Foote*, 113 Illinois, 228-234, the court said:

"As was said by this court in *Pixley* v. *Boynton*, 79 Ill., 351, the true idea of an option is what are called, in the peculiar language of the dealers, 'puts' and 'calls.' A 'put' is defined to be the privilege of delivering or not delivering the thing sold, and a 'call' is defined as the privilege of calling for or not calling for the thing bought. Optional contracts, in this sense, are usually settled by adjusting market values, as the party having the option may elect. It is simply a mode adopted for speculating in differences on the market value of grain or other commodities. It must have been in this sense the term 'option' is used in the statute. Such a contract is obviously fictitious, having none of the elements of good faith, as in a contract where both parties are bound, and is defined by statute as a gambling contract."

To same effect *vide Union Natl. Bank* v. *Carr*, 15 Federal R., 438.

In *Tenney et al.* v. *Foote*, 95 Ill., 99, the court approved of a decision by the Appellate Court (*Tenney* v. *Foote*, 4 Bradw., 594), in the following language:

"We may add in conclusion, we see no objection to the law as announced in the opinion adopted by the Appellate Court, and written by the Circuit judge who was formerly a distinguished member of this court."

The opinion referred to, 4 Bradwell, 594, adopts the opinion of Judge McAllister, Circuit judge, as its own.

In that opinion, set out in 4 Bradw., 594, Judge McAllister states:

"There has been much difference of opinion as regards the nature of the contract prohibited. It must be, to fall within the prohibition, a contract to have to one's self, or give to another, an option to sell or buy some commodity at a future time. The word 'option' is one much in use on the Chicago Board of Trade, and probably has more than one sense given to it there. Boards of trade for dealing in the principal products of the country are of comparatively recent origin. The system seems to have been borrowed from, and, in its general features, modeled after, the more ancient institution known as the stock exchange, in which many phrases, words and terms of peculiar local meaning came into use; and it will be found that ma[illegible]e these have been carried into and adopted in boards of [illegible]e. Now, the word 'option' was in use long ago in the stock exchange, and seems to have acquired a definite meaning. As there used, it meant 'a stipulated privilege to a party in a time contract, of demanding its fulfillment on any day within the specified limit.' Webs. Dic., Ed. 1872, p. 917.

"In practice, on the stock exchange, it was often the intention of the parties that no stock should be delivered, but the transactions settled upon differences. This became common, and the English statute was aimed at its repression because it was, in effect, gambling. Our statute is directed against the same evil, and extends to transactions in grain and other commodities, as well as stocks. So that the word 'option' as used in the statute here, taken with the context, means a mere choice, right or privilege of selling or buying; and it is the contracting for such choice, right or privilege of selling or buying at a future time, any commodity the statute was intended to prohibit, as contradistinguished from an actual sale or purchase, with the intention of delivering and accepting the commodity specified."

It is well settled law in Illinois that all contracts for the purchase and sale of property, with the understanding or agreement of the parties (whether that agree-

ment is expressed on the face of the contract or exists by secret understanding) that the property is not to be delivered or accepted, but the contract satisfied by an adjustment of the difference between the contract and market prices, are mere wagers or gambling contracts and void.

Schneider v. *Turner*, 130 Ill., 128.
Pope v. *Hanke*, 155 Ill., 621.

But in order to invalidate the contract, it must appear that neither party has the intention to deliver the property, and that both parties have the intention of settling the differences only.

Jamieson v. *Wallace*, 167 Ill., 388, 396.
Soby v. *People*, 134 Ill., 71.
Edwards v. *Hoeffinghoff*, 38 Fed., 640.
Irwin v. *Williar*, 110 U. S., 499–508.

And the burden is on the party claiming that the transaction is illegal to show that it is, and if either party contracted in good faith he is entitled to the benefit of his contract, no matter what may have been the secret purpose or intention of the other party.

Pixley et al. v. *Boynton*, 79 Ill., 351.
Scanlan v. *Warren & Co.*, 169 Ill., 142.

This was well illustrated in the case of

Roundtree v. *Smith*, 108 U. S., 268,

a case involving dealings between Roundtree and appellees, who were brokers on the Chicago Board of Trade. The suit was brought in the United States Circuit Court for the Western District of Wisconsin, and defendants, who interposed a plea of gambling, admitted:

"I could not say that I had any understanding on the

subject of the nature and character of the Board of Trade deals, whether the property was to be actually delivered or whether it was to be settled for.''

The court held the lower court was justified in directing the jury to find for the plaintiff.

In *Bibb* v. *Allen, supra*, this case and others were considered by this court in the following language:

" It is further well settled that the burden of proof is upon the party who seeks to impeach such transaction by showing affirmatively their illegality. *Roundtree* v. *Smith*, 108 U. S., 269; *Dykers* v. *Townsend*, 24 N. Y., 57; *Irwin* v. *Williar*, 110 U. S., 499, 507, 508. In this latter case the trial court charged the jury that ' the burden of showing that the parties were carrying on a wagering business and were not engaged in legitimate trade or speculation, rests upon the defendant. On their face these transactions are legal and the law does not, in the absence of proof, presume that the parties are gambling. A person may make a contract for the sale of personal property for future delivery which he has not got. Merchants and traders often do this. A contract for the sale of personal property, which the vendor does not own or possess, but expects to obtain by purchase or otherwise, is binding, if an actual transfer of property is contemplated. A transaction which, on its face, is legitimate cannot be held void as a wagering contract by showing that one party only so understood and meant it to be. The proof must go further and show this understanding was mutual—that both parties so understood the transaction. If, however, at the time of entering into a contract for a sale of personal property for future delivery it be contemplated by both parties that at the time fixed for delivery the purchaser shall merely receive or pay the difference between the contract and the market price, the transaction is a wager and nothing more. * * * It is not sufficient for the defendant to prove that Irwin & Davis never understood that they were to deliver wheat in fulfillment of the sales made for them by the plaintiffs. The presumption is, that the plaintiffs expected Irwin & Davis to execute their con-

tracts, expected them to deliver the amount of grain sold, and before you can find that the sales were gambling transactions and void, you must find from the proof that the plaintiffs knew or had reason to believe that Irwin & Davis contemplated nothing but a wagering transaction, and acted for them accordingly. * * * This court approved that charge as a correct statement of the law upon the subject of what constitutes a wagering contract."

Ibid, 149 U. S., 492.

In an earlier case, *Bangs* v. *Hornick*, 30 Fed. R., 97, counsel contended that it was the absolute duty of the court to denounce the transaction there under consideration unless it clearly appeared that it was a valid and honest one. But says Judge BREWER:

"I think the duty of the court is precisely the reverse, and that it is the duty of the court to uphold it unless it appears that it was an invalid and dishonest one."

Apply these principles to the case at bar.

There is no evidence in this case that Clews did not intend to deliver the stock that he contracted to sell, or that Jamieson & Co. did not intend to receive and pay for the same. If the plea of gambling had been set up by the defendants Jamieson & Co., such plea must have been overruled, unless it appears to the satisfaction of the court that the method of procedure adopted by the Chicago Stock Exchange necesssarily and of itself constituted gambling. Such opinion could only be predicated upon the rules of the clearing house.

The view of the lower court that the contract was a gambling contract is, as we have shown, due largely to an entire misconception of what the dispatches referred to.

But the authorities cited by the lower court in no way impugn the clearing house system.

The case of *Irwin* v. *Williar*, 110 U. S., 499-508, cited by the court, holds that a contract for the sale of goods to be delivered at a future date is valid even though the seller has not the goods or any other means of getting them, than to go into the market and buy them.

In the other case cited by the lower court, *Embree* v. *Johnson*, 131 U. S., 336, "the evidence showed that the purchase or delivery of actual cotton was never contemplated, either by the defendant or the said Moody & Jamieson. It was understood between them that the settlement was to be made between said parties by one party paying to the other the difference between the contract price and the market price of said cotton futures, according to the fluctuations of the market."

Ibid., 338.

Bibb v. *Allen*, 149 U. S., 481, cited by the court in its opinion, approved the charge of the lower court to the jury that there was no evidence in the case upon which a verdict for the defendant Bibb (who interposed a plea of gambling) could rest. The contract sued on was not a gambling contract and was, therefore, valid. This court pointed out that the rules and regulations of the New York Cotton Exchange, which recognized no contracts except for the sale and purchase of cotton to be actually delivered, were germain, competent and relevant in showing that the parties did intend an actual delivery of the cotton in question, saying, "These rules and regulations imposed upon the seller the obligation to deliver the cotton sold, and upon the purchaser the obligation to receive it, except in certain specified cases which have no application to the present case."

Article 15, section 1, of the rules of the Chicago Stock Exchange provides as follows:

"Any member who fails to comply with his contracts, or who becomes insolvent, shall be suspended until he has settled with his creditors."

Article 17 of the same rule provides as follows:

"Fictitious Sales, Bids and Offers. Sec. 1. No fictitious sale shall be made. Any member contravening this section shall, upon conviction, be suspended by the Governing Committee."

Article 29 provides:

"Any member of this Exchange who is interested in, or associated with, or whose office is connected directly or indirectly by wire or other method or contrivance with any organization, firm or individual engaged in the business of dealing in differences or quotations on the fluctuations in the market price of any commodity or security without a bona fide purchase or sale of such commodity or security in a regular market or exchange, shall, on conviction thereof, be deemed to have committed an act or acts detrimental to the interest and welfare of the Exchange."

Article 4 provides:

"No sale of securities shall be made on which a deposit shall be offered as the limit of liability."

Article 17 of the by-laws provides:

"Should any member neglect to fulfill his contract on the day it becomes due, the party or parties contracting with him shall, after giving notice as required by section 2 of the preceding article, employ an officer of the board to close the same forthwith in the Exchange by purchase or sale as the case may require, unless the price of settlement has been agreed upon by the contracting parties. In case of a failure of a creditor to close the contract as above, the price shall be fixed by the price current at the time such contract ought to have been closed under this rule. In all cases where an officer may be directed to buy or sell securities under this rule, the name of the member defaulting as well as that of the member giving the order shall be announced."

Section 10 of the rules governing the clearing house, provides:

"The same rules as to notice, time and place that govern defaults in other contracts shall apply to transactions in 'the account.'" (Rec., 140–142.)

These rules show that the Stock Exchange certainly contemplated delivery; the transaction itself shows that delivery was intended, and there is no proof that delivery was not intended by the parties.

Complaint certainly cannot be made that the rules of the Stock Exchange require parties to put up margins as security for the performance of their contracts. If the contract itself is lawful, the putting up of margins to cover losses which may occur from the fluctuations of prices and the final settlement of the transaction according to usages and rules of the exchange are entirely legitimate and proper.

Love J., in *Union Natl. Bank* v. *Carr*, 15 Fed., 438.

Sage J., in *Edwards* v. *Hoeffinghoff*, 38 Fed., 635-639.

An instruction to this effect was assumed to be correct by this court in

Hansen v. *Boyd*, 161 United States, 397-406.

The fact that the rules of the exchange allow the party to be sold out if he defaults in his margin in no way affects the validity of the transaction.

In *Bibb* v. *Allen*, *supra*, the cotton advanced beyond the price at which it was sold for delivery, and plaintiffs below, in pursuance of the rules and regulations of the New York Cotton Exchange, called upon Bibb & Co. to put up mar-

gins covering the advance in price, and were finally notified that if they did not put up margins they would be sold out. In pursuance of notice Allen & Co., plaintiffs below, went into the market and bought cotton "to cover" that which they had sold for account of Bibb & Co., and to make good their contracts. The court says:

"This they were required to do, both by the terms of their contracts with the parties to whom the cotton had been sold, and by the rules and regulations of the exchange, of which they were members. If they had failed 'to cover' or comply with such contracts, they would have been liable to expulsion from the exchange. The cotton which they bought 'to cover' these contracts was purchased at the market price."

Ibid, 149 U. S., 501.

And the court held that the difference between that price and the price of bales previously sold and plaintiff's commissions constituted a claim against Bibb & Co., for which they were entitled to recover.

The court in the same opinion proceeds as follows:

"In the case of *Perin* v. *Parker*, 126 Illinois, 201, 211, where the transactions were similar to those in question here, it was said by the Supreme Court of Illinois: 'Parker, as agent for Perin, and acting under his orders, sold the corn for Perin, and under the rules of the Board of Trade and the custom of the Chicago market, he was personally bound to the purchasers on these contracts of sale. Parker and Perin were dealing with reference to such rules and such custom with which they were both perfectly familiar. The rules of the Board of Trade provided that on time contracts purchasers should have the right to require of sellers 10 per cent. margins, based upon the contract price of the property bought, and further security, from time to time, to the extent of any advance in the market value above said price. The price of corn had been rapidly advancing since the date of the sales. Parker either had deposited

margins upon the contracts or was liable to be called on for the 10 per cent. and the additional margins by the persons to whom he had sold the corn. The evidence does not seem to disclose whether or not the purchasers had either received or called for margins. Even if they had not, yet there was an existing legal right in them to call on Parker for margins, and a legal liability upon the latter, within the next banking hour thereafter, to deposit the margins called for, and also, within that time, deposit with the secretary of the board, or the parties calling for such deposits, duplicate certificates of deposit, signed by the treasurer of the board or an authorized bank.' "

Bibb v. *Allen*, 149 U. S., 481–501.

Nor does it support the opinion of the lower court to suggest that the method of substitution of purchasers will in any way invalidate or render illegal the contracts in question.

In *Hansen* v. *Boyd*, 161 U. S., 397–407, a suit was brought by Boyd and others, members of the Board of Trade of Chicago, against Hansen to recover the amount of payments alleged to have been made for account of defendant on account of purchase and sale of certain grain made for account of the defendant in the City of Chicago. Hansen pleaded that the transactions in question were mere wagering contracts. Hansen was generally familiar with the manner in which business was done on the Board of Trade of Chicago, and testified that he supposed the transactions were to be conducted for him on the Board of Trade at Chicago; but claimed that at none of the interviews between himself and the plaintiff's agent was any allusion made to the Board of Trade or the rules of the Board of Trade; and also that it was not his intention to buy or sell any grain, but that he contemplated mere speculation on margins. Hansen became delinquent in furnishing mar

gins, and May wheat was bought on his account at various prices. Later on, the brokers requested his consent to transfer the May to June wheat. Hansen gave no satisfactory response to this inquiry, and later on, in April, plaintiffs sold May wheat on which Mr. Hansen was in default for margins, at a given price, and the loss was charged against Hansen's account. Plaintiffs then bought June wheat and sent a memorandum notice of the May wheat and the purchase of the June wheat to Hansen, together with an account of the loss sustained on the May wheat; and failing to get settlement of the account, in June closed the open contracts on their books, by sale of June delivery wheat, and charging the loss and commissions against Hansen.

Among other instructions given for the plaintiff, and to which the defendant excepted, is the following:

"I might say to you here that if you find from the evidence that any of these contracts had been offset under the rules and regulations as prescribed by the Board of Trade of Chicago, offsets between persons and dealers connected with that board through whom these plaintiffs operated, that is not evidence of their illegality. The mode of settlement of *bona fide* contracts for the sale of actual wheat does not affect the validity of the contract if the original intention was to purchase, receive, take and deliver the actual wheat at the time specified when the contracts were made."

But the court held that taken into consideration with other instructions offered there was no objection to this instruction. The court did hold that the changing over of the May wheat into June for and on behalf of the defendant, without the consent of Hansen, was unauthorized and to that extent required a remittitur; but never suggested or dreamed of holding that "ringing out the trades" by off-sets in any way made it a gambling transaction.

No intimation was made in *Irwin* v. *Williar*, *supra*, that "ringing out" the trades made the contract a gambling trade.

This same view of the validity of contracts on the Chicago Board of Trade was expressed at an early date in *Clark* v. *Foss et al.*, 7 Biss., 540.

That was a suit brought in the Circuit Court for the Western District of Wisconsin, by the assignee of a bankrupt to set aside certain promissory notes and a mortgage securing the same on the ground that the same were given to secure payments growing out of option contracts on the Chicago Board of Trade, which, it was claimed, were gambling transactions and contrary to the law of the State of Illinois. In that case it appears from the statement of facts by the court the outsider having failed to perform his contract, the brokers performed their contract by going upon the market and purchasing the wheat and corn; that as to 30,000 bushels of corn they made a delivery, and as to 8,000 they closed out the deal in the manner before indicated by mutual offset and adjustment of differences; that this adjustment of differences is a mere matter of convenience to members of the board, and to their customers; that no person is under the least obligation to settle in that way; that dealers may, and often do, insist upon an actual delivery of the grain, and that settlement frequently saves their customers the cost of insurance and storage; that the object of forming these rings or clearing house is to close out the transactions, and get them off their books, and this is what they call ringing it out; but that it frequently cannot be done in that way, as if, for any reason, one whose assistance is essential to complete the circle prefers an actual delivery, in which

case the ring is broken, then each must perform his contract by actual delivery of the grain.

The court held that settling by the "ringing up" process did not make it a gambling contract.

This case, according to the decision of Judge DYER, in *Ward* v. *Vosburgh*, 31 Federal, 15, was appealed from the Circuit Court; and in an oral opinion delivered by DRUMMOND, circuit judge, contracts involved in the foregoing case were sustained, and the decision of the District Court was affirmed.

In *Ward* v. *Vosburgh*, *supra*, Judge DYER pointed out that the Wisconsin statute was broader in its scope than the Illinois statute and that hence the decisions in the Wisconsin court did not apply to an Illinois transaction. Noting that *Barnard* v. *Bachhaus*, 52 Wis., 593, was based upon the Wisconsin statute and should not control an Illinois transaction, Judge DYER said:

"*Clark* v. *Foss*, in many of its prominent features, is on all fours with the case at bar, involving also the validity of settlements made by the so-called ringing up process and the contracts out of which that case arose, were sustained. * * * In *Clark* v. *Foss*, *supra*, the 'ringing up process' is commented upon, and shown to be in and of itself a legitimate method of adjusting differences in accordance with the rules of business prevailing in the clearing houses of the country.

"In *Williar* v. *Irwin*, *supra*, it was said by Judge GRESHAM in his charge to the jury:

"'The testimony tends to show that a general custom obtained among grain commission merchants in Baltimore to the following effect: When one commission merchant, upon the order of a customer, sells to another commission merchant a quantity of grain for future delivery, and it occurs that at some other time before the maturity of the contract the same commission merchant receives an order from another customer to purchase

the same or a larger quantity of the same kind of grain for the same future delivery, and he executes this second order by making the purchase from the same commission merchant to whom he had made the sale in the other case, that then, in such case, the two commission merchants meet together, and exchange or cancel the contracts as between themselves, adjusting the difference in the prices between the two contracts, and restoring any margins that may have been put up; and from that time forth the first commission merchant holds for the benefit of the customer for whom he sold the order or contract of the purchaser for whom he bought, so that the grain of the selling customer may, when delivered, be turned in on the order or contract of the purchasing customer, and that the commission merchant is held responsible as guarantor to his customer. The evidence also tends to show a custom obtained among commission merchants in Baltimore to the further effect that, though the second transaction may have been had with a different commission merchant from the one with which the first transaction was had, yet where it can be found that a series of contracts are in existence for the sale of like grain for like delivery, so that the seller owes the wheat to the buyer to whom he sold and he to another who owes like wheat for like delivery to the first commission merchant, that then, in such case, they settle by what they call a 'ring,' that is, they all reciprocally surrender or cancel their contracts, adjust differences in price between themselves, and surrender all margins that have been put up; that in all such cases the commission merchant substitutes the contract of another customer in place of that with the commission merchant whose contract has been canceled or surrendered; and that he guarantees to his customer the performance of the contract originally made in his behalf.'

"This is a very good statement of what the testimony in the the case at bar shows transpired between the parties, in the transactions here in question; and Judge Gresham held that the customs referred to were founded in commercial convenience, and that they were not in contravention of the law, but valid.

"The Supreme Court of the United States, in the 110

U. S., 499, in its review of the case above cited reversed the judgment of the court below upon another point, but did not question the correctness of Judge Gresham's ruling upon the validity of the method of business referred to, by which differences were adjusted.

"I must hold, therefore, that for want of adequate proof of an actual intention on the part of both the defendant and the parties with whom the plaintiff as his agent dealt, not to make real sales and purchases, or not to make actual deliveries of property sold and purchased, the contention that the contracts were mere gambling transactions is not established."

Ward v. *Vosburgh*, 31 Fed., 17.

In *Lehman* v. *Feld*, 37 Federal, 852 (Southern District of Mississippi), the practice of ringing out trades on the New Orleans Cotton Exchange was claimed to be evidence of a gambling transaction. Judge Hill, in denying this claim, referred to the rules of said exchange and said:

"These rules and regulations do not require the members purchasing or selling on the floor of the exchange to disclose the names of those for whom they sell or purchase, but each member or firm making such sales or purchases must guaranty, and become personally bound for, the performance of all contracts so made, as though each was a principal, instead of an agent. The members of the exchange may at stated times, or whenever it is agreed upon between themselves, 'ring out' or 'close out' the said contracts of purchases or sales, by striking a balance, or setting off one contract against another, so as to substitute one for the other; the seller being still prepared and liable to deliver, and the purchaser to receive and pay for the same quantity of cotton, of the grade and at the price stipulated in the original contracts at the time stated for delivery; each being bound to the other on the guaranty assumed, but on behalf of the unknown principals. These rules and regulations further provide that, to secure the performance of the contracts

by each individual or firm so contracting a margin of $1 per bale shall be deposited at the time of the contract, and shall be renewed from time to time, as the rise or fall in price may require, according to the conditions prescribed in these rules and regulations, by which all of the members are governed. * * * The testimony of the plaintiffs is that they had purchased, or obtained upon adjustment of balances, as provided by the rules and regulations, other cotton contracts of the same grade, in the same quantity, to be delivered at the same time, and to be paid for at the same price, and held the same to replace those originally purchased, and it is these substituted contracts which were closed or sold out, resulting in the loss to recover which this suit is brought.

It is insisted on the part of the defendant that the proof does not show the plaintiffs set off on their books and appropriated these substituted contracts in place of the original contracts, so as to render those making them liable to the defendant; and hence, at the time of the alleged sale, producing the loss for which the action is instituted, plaintiffs held no contracts on behalf of defendant or those for whom he acted. * * * It was necessary that the plaintiffs should have had contracts for the delivery of cotton of the same quantity, at the same price, and at the same time provided in the original contracts of purchase —contracts corresponding in all respects with the original contracts had they remained uncanceled and in force; in other words, contracts to be substituted for the original contracts. * * *

"These rules and regulations recognize the right and duty of the members to settle balances with each other, as before stated, so that the cancellation of the original contracts was not a violation of the duty and obligation of the plaintiffs towards those for whom they dealt."

Ibid., 855.

II.

THERE WAS PRIVITY OF CONTRACT BETWEEN CLEWS & CO. AND JAMIESON & CO.

The cases already cited, which involve the question of "ringing out" of trades on the various exchanges, establish the privity of contract between the seller and the parties substituted by the "ringing out" system as purchaser from his broker. The decisions were necessary, as in those cases the system was attacked on the ground that it was a part of a gambling system, under which contracts were cancelled through mutual set-offs. Before calling your attention to other cases where the contracts, performed by the ringing out of trades, were sought to be set aside or avoided on the ground of like privity, permit us to call your attention to the genesis of the Stock Exchange clearing house.

The reason we call attention to these decisions on ringing up trades, is, that they have been thoroughly discussed by the Illinois courts, and universally sustained. But the ringing up of trades is only another name for the clearing house system, and it is fair to assume that a court that will sustain the substitution of a purchaser in the ringing up of trades will sustain the substitution of a purchaser by means of a *clearing house.*

The trading "for the account" is borrowed from the practice of the English Stock Exchange, and the system is fully explained in Dos Pasos on Stock Brokers and Stock Exchanges, page 273 *et seq.*

On the London Stock Exchange the account day, or, as we call it, delivery day, is twice a month. An outgrowth of trading "for the account" or contracting for

a future delivery day and the ringing up of trades therein is the Stock Exchange clearing house. The author of the American & English Ency. of Law, 2d Edition, states:

"The utility and convenience of a clearing house system have led to its adoption in commercial transactions other than those between banks. In London there is a railroad clearing house, by means of which distribution is made among the different companies associated in the proceeds of through traffic over the several railways; and there has also been established in the same city a Stock Exchange clearing house, which undertakes to adjust exchanges consisting of moneys or moneys' demand, or quantities of stock; and in New York there appears to have been organized and operated by a single banking corporation a department known as the clearing house for the general clearance of contracts for the purchase and sale of gold."

Ibid., Vol. 6, p. 116.

Dos Pasos, in his work on Stock Brokers, *supra*, speaks of the organization of the London Stock Exchange clearing house in the following terms:

"An important extension of the clearing principle was effected by the establishment in 1874 of the London Stock Exchange clearing house, which undertakes to clear not sums of money, but quantities of stock. As stock brokers settle their transactions only once a fortnight, or in consols once a month, it naturally arises that in the intervals the same broker will usually have bought the same kind of stock for one client and sold it for another. The very same stock may have passed through several different hands, and the same brokers may have had reciprocal dealings with each other. Instead then of actually making transfers of stock for each transaction and paying by checks which greatly swelled the business of the Lombard street clearing house on settling day, a plan has been arranged according to which each member of the clearing house prepares a statement of the net

amount of each stock which he has to receive from or to deliver to each other member. The manager of the house, after verifying these accounts, which should balance in the aggregate, directs the debtor members to transfer quantities of stock to the creditor members in such a way as to close all the transactions. * * * A separate clearing is, of course, to be made for each kind of stock. It is found that the quantities actually transferred do not exceed ten per cent. of the whole transactions cleared, and the checks drawn are diminished on settling days as much as ten millions sterling. (Jevon's Money and the Mechanism of Exchanges, pp. 281, 282.)"

Ibid., 278, foot note.

Mr. Alexander D. Noyes, in an article in the *Political Science Quarterly*, Vol. 8, No. 2, page 252, June, 1893, states that the system of a clearing house for stocks was adopted in the New York Stock Exchange in the early months of 1892, but had been in existence elsewhere for at least twenty-five years. He says:

"Ordinarily in the first experiments they took the form of so-called 'ringing out' contracts in the same security. By this plan, if A sold B a given amount of one security, and if B had personally sold the same amount to C, the series of trades may be personally adjusted between the three traders, so that the only actual exchange required would be the transfer of the securities from A to C. Of course, the number of traders in the series might be extended indefinitely, for the system did not require that the prices at which the trades were made should have been uniform."

The author notes that the first efficient establishment of this kind in Europe was founded in the Handel's kammer at Frankfort, May, 1867; the Berlin Exchange adopted the system in 1869, Hamburg in 1870, Vienna in 1873 and London in 1876. But while the Paris Bourse has never established a regular clearing-house for stocks, the members by voluntary compari-

son of accounts by brokers' representatives, similar in its general workings to the system of bank clearances, attain the same ends.

Such being the genesis of the clearing house, we observe that it is simply an expansion of the ringing up system. The views of the Illinois courts, therefore, as to the validity and effectiveness of the ringing up system are especially important. For if those courts hold that privity of contract exists between C, who by the ringing out of the trades between himself, B and A becomes substituted as buyer from A instead of B, the original buyer, they must hold that it is immaterial whether C is not found until the delivery, so long as B or somebody else is the purchaser during all the intervening period.

The earliest and one of the most instructive of cases is that of *Oldershaw* v. *Knoles*, 4 App., 71. It happily illustrates how unmeaning to a court modern commercial contracts are without proof of customs of the market wherein the contract is to be performed, and how certain, definite and complete they turn out to be when the customs of the local market are fully explained. In that case Oldershaw, the broker on the Chicago Board of Trade, got this dispatch from Knoles, a resident of Jacksonville, Illinois:

"If April lard, ten ninety, buy two fifty."

"The court found this dispatch meant that if lard deliverable at such time in April as either might elect could be purchased at prices specified, this broker was to buy for him 250 tierces. The broker filled the order and subsequently received two other orders which he filled, buying all told 1,000 tierces. With the last purchase Knoles remitted $700 to be used as margins on the purchase. The price declining rendered this sum too small for margins, and Oldershaw demanded more margins which

appellee failed to advance, whereupon appellant sold all the purchases at a considerable loss, for which and his commissions he brought suit."

Upon the trial it was found that after the several purchases of lard by the plaintiffs for the defendants and before the sale of the same by the plaintiffs in the market the plaintiffs as to 750 tierces of lard settled the said purchases with the members of the Board of Trade, from whom the same were made, they in each case realizing a small profit, and made a settlement of the remaining 250 tierces, suffering a small loss.

Appellant, so the opinion states (p. 67), offered to prove that,

"as to the said purchase of lard made on behalf of appellee, the three settlements made prior to February 21st were effected in the following way, and not otherwise: that after making said purchases in the ordinary course of business upon the board of trade, it was found that appellants had sales made on account of other parties, customers of appellants, who were entirely responsible, for corresponding amounts of lard of the same delivery to the extent of 750 tierces; that such sales were made to said customers of appellants, either directly to the same parties from whom the purchases were made for appellee, or to some other person or persons who had sold lard to the parties from whom it had been purchased by appellants for appellee; that finding out this condition of facts after said purchases had been made on account of appellee, appellants, in accordance with the general custom and usage obtaining in such matters upon the Board of Trade, made the settlements as to the 750 tierces of lard with the parties from whom they had it purchased; that by such settlements appellants obtained no interest whatever in the lard bought for appellee, but that the effect of such settlements in each case was merely to discharge the party from whom the lard had been purchased for appellee, by substituting in his stead another entirely responsible person for whose account appellants had the

lard sold, leaving appellants responsible to such new party to carry out the contract of purchase, and making such new party liable to appellee, in all respects, to deliver the lard through appellants to him as the party from whom appellants had originally bought the lard for appellee," and the appellant also offered to prove that "for a long time prior to making the settlements in question, had been the general custom and usage upon the Board of Trade, to make settlements between the commission merchants upon mutual consent and for their mutual convenience, of the character described by the witnesses, in such cases as that at bar, where it is found that purchases and sales have been made of and to the same party directly or indirectly; that by such settlement the commission merchant substituted for his customer the reponsibility of a party for whom he had previously made the sale for that of the party from whom he had made the purchase, and that such substitution was in accordance with the uniform custom and usage of dealers on the Board of Trade in such cases."

This offer was denied; and the Appellate Court of Illinois for the First District said:

"If the evidence offered had been admitted, it would have appeared that by a general and uniform custom upon the Board of Trade settlements of this character were made, and another responsible seller of the same commodity substituted for the one originally furnished to the customer. It must be deemed that this custom was within the meaning and intention of appellants and appellee; that appellee had it in view when he employed appellants to make such purchases for him, and that it entered into and formed a part of the contract between the parties.

The exceptions to the rule authorizing the admission of evidence of custom or usages of trade are where such custom would vary the terms of an express contract, or contravene an established rule of law. As we have already seen, there was in this case no express contract between the parties, any of the terms of which were repugnant to the custom and usages sought to be proved. Nor are we able to perceive that such custom is in contravention

of any established rule of law. It would have been entirely competent for these parties, by *express* agreement, to have provided for a substitution by the appellants of one vendor for another, precisely as was sought to be done in this case. Appellee might have expressly authorized appellant to buy for him the lard in question of one party, and to subsequently exchange such contract for that of any other responsible party they might select, provided only that some contract of a responsible seller in appellee's favor should all the time be kept open so as to secure the delivery of the lard at the time agreed upon. No rule of law would be contravened by such express contract, and precisely the same may be said of a contract implied from the circumstances and the usages of trade. If such provision would be valid in an express contract, it would be equally so in an implied contract." * * *

In response to the contention that by virtue of the custom, a broker became personally interested in the business of his principal, and thus assumed a position adverse to those for whom he was employed to act, the court said:

"Appellants were engaged in a general business as commission merchants. In such business they were acting not merely for appellee, but doubtless for many other customers as well. The profits derived from the various settlements made by them under the rules of the Board of Trade belonged, not to themselves, but to their customers. A substitution for a purchase made of a third party of a like commodity previously or subsequently sold for another customer, rendering such other customer an account of the differences received or paid on settlement of the original deal, would not, we think, involve the commission merchants in any interest in the business adverse to their principal. It is true, in all these transactions, they had an interest as nominal principals, and as actual guarantors to those for whom they dealt. Such interest, however, we think was not obnoxious to the principle of law sought to be invoked. * * * By these settlements they obtained no interest whatever in the lard bought for appellee; the effect was, in each case, to dis-

charge the party from whom the lard had been purchased for appellee, by substituting in his stead another responble vendor, for whose account appellants had already made an equivalent sale of lard, leaving appellants responsible to such new party to carry out the contract of purchase, and making such new party liable in all respects to deliver such lard to appellee. through appellants, in the place of the party from whom appellants had originally made the purchase for appellee."

Ibid., 4 Bradw. (Ills.), 72, 73.

The case went back for a new trial and upon said trial the trial court allowed evidence of the custom to be introduced, but held the custom was void. Upon appeal to the Appellate Court, again Judge Bailey, speaking for the court recited the offer made upon the first trial, that said settlements were made in pursuance of

"a general custom and usage prevailing on the Board of Trade, by which, whenever it was ascertained that a commission merchant had made a contract of purchase, for future delivery, of a given quantity of a particular commodity, and had also made with the same or some other party a contract of sale of a like quantity of the same commodity for the same delivery, and (in case the two contracts were made with different parties) where it appeared that such parties had outstanding similar contracts with each other, either directly or through other dealers, so as to form a chain or ring of contracts for the purchase or sale of a given quantity of a particular commodity for the same delivery, a clearance or settlement was immediately effected between the parties, as between themselves, each paying or receiving the difference between the price fixed in his contract of purchase and that fixed by his contract of sale; that such clearance or settlement was made by mutual consent of the commission merchants concerned, and for their mutual convenience, and that its effect upon the rights of their customers for whom contracts of sale or purchase for future delivery had been made, was to merely substitute in case of a purchasing customer the contract of another customer for whom the merchant had

already made a sale, in place of the contract of the third party from whom he had made the purchase in the first instance, and *vice versa.*" *Oldershaw* v. *Knoles*, 6 Bradw. (Ill. App.), 325-329.

The court after referring to its former opinion said:

"But even if the validity of the custom or usage established by the evidence was an open question in this case we are still of opinion that it is valid." *Ibid.*, 6 Bradw., 331.

You will observe that this "ringing out" is precisely what the clearing house does in the case at bar. Only in the clearing house of the exchange the "ringing out" is done every day until the final delivery day, the contract of sale being in force all the time with some one.

But it was urged in that case, as in this, that there could not be a subsisting contract, because in the ringing out the substituted contract to buy was not identical in price with the contract canceled. In the case at bar it was urged by Jamieson's counsel and by Judge Grosscup of the Circuit Court, that Clews having authorized a sale at 229 could have no contract with Jamieson at 222. (Rec., 94.) But Judge Bailey quickly disposed of that contention, as follows:

"It is urged, however, that even conceding the validity of the custom authorizing a commission merchant, on making clearances or settlements with other members of the Board of Trade, to substitute with his customer in place of the contract canceled by the settlement another contract, identical in terms, previously made by him for another customer, the contracts sought to be substituted in the present case were not identical in point of price with the contracts canceled, and for that reason could not be so substituted.

"It should be observed that according to the custom in question a commission merchant can be a party to such clearance or settlement only when he appears in one contract as a purchaser and in another as a vendor of the

same amount of a particular commodity for the same delivery. If he is dealing as a commission merchant solely, and not on his own account, as appears to have been the case with the plaintiffs, he must have made a contract of purchase for one customer, and a contract for the sale of the same amount, for the same or some other customer, both for the same delivery. The contract must necessarily be identical in terms in all respects except as to price. But the evidence shows that by the process of settlement this difference, if any exists, is provided for and compensated. For example: if a dealer has made for A, one of his customers, a contract to sell 5,000 bushels of wheat at $1 per bushel, and for B, another customer, a contract to purchase the same amount, at 95 cents per bushel, he collects on the settlement the difference between these two prices, and passes the same to the credit of A, thus reducing the amount. A will, therefore, be entitled to receive for his grain 95 cents per bushel, the precise amount B contracted to pay. The process of settlement merely releases the dealer from his liability to other members of the board, and brings together two of his customers, a seller and a buyer, and makes them parties to one contract." *Ibid.*, 6 Bradw., 331.

In the case at bar, every day after July 27th, Diamond Match was going down. Schwartz was taking out of the clearing house for Clews, from the purchasers substituted, the difference between the price at which it was sold, or 229, and the clearing house price, so that on August 3d, when the price struck 222, he had collected seven points. As Schwartz was Clews' agent, Clews got the money. In other words, on August 3d, if Jamieson had paid 222, Clews, by Schwartz taking down these margins, would have 229 in his pocket, the price at which he sold it. Clews was never to get less than 229 and never to get more than 229.

In *Curtis* v. *Wright*, 40 Illinois Appellate, 491, the court followed the decision in the Oldershaw case, and

held that it was no error for the lower court to refuse to give an instruction to the jury as follows:

"Unless you believe from the evidence that the defendant, Curtis, had competent knowledge of the rules, regulations and usages of the Board of Trade relating to settlement of contracts, by off-sets, and relating to the exchange and substitution of contracts, then Henry Curtis was not and is not bound by such rules, regulations and usages; nor in that case could or did any substituted, exchanged or off-set contract, if any were made by the plaintiff for him, supplant or take the place of any original contracts, if any were made by the plaintiffs for him, upon said Board of Trade."

In *Pardridge* v. *Cutler*, 68 Illinois Appellate, 569–575, the court followed the Oldershaw case, and said:

"It was shown that all through these dealings appellant's transactions were closed out by what is known as 'ringing up,' and this, it is said, was improper. 'Ringing up,' it appears, is nothing more or less than the setting-off of one trade against another—a thing which occurs in great cities in mercantile transactions as to 95 per cent. of the entire volume of business; that is to say, in great cities, on purchases and sales of merchandise to the extent of $100,000, in the settlement of the same, upon the average less than $10,000 in money is actually paid, payments being made through checks upon bank, credit balances being set off against each other. The closing up of transactions on the Board of Trade for the purchase and sale of grain, by setting off one trade against another—in the parlance of the exchange, 'ringing up'—is necessarily no more illegal or improper than is the setting off of credit balances by merchants through checks on banks. True it is, as is urged by appellant, that thereby the identity of the transaction by him had upon the board was lost; that is to say, having purchased a thousand bushels of corn from A, and sold a thousand bushels of corn to B, if each transaction was closed out by a setting off of one against the other, he then had a contract for the delivery of grain with neither. Such result was for his convenience, and entailed upon him no loss, and such method of closing

up transactions was a thing of which he was during all these years well aware, without making complaint thereof. *Oldershaw* v. *Knoles*, 4 Ill. App., 63; *Oldershaw* v. *Knoles*, 6 Ill. App., 325."

While this case of *Pardridge* v. *Cutler* was reversed, *Ibid.*, 168 Ill., 104, the reversal was on an entirely different point.

In *Riebe* v. *Hellman*, 69 Ill. App. Ct., 19–22, the court said:

"That in the purchase and sale of this wheat, that there was what is known as 'ringing up' does not make the transaction illegal. *Pardridge* v. *Cutler*, First Dist. Ill. Opinion filed February 1, 1897."

As already suggested, the clearing house system does not differ in principle from the system of "ringing up" trades. The statement of facts shows that under the clearing house system the buying broker, in effect, agrees that on the "delivery" day he, or some one else ascertained by the clearing house, will receive and pay for the stock sold. The seller agrees to accept such person so ascertained by the clearing house on "delivery" day as the buyer, and deliver the stock to him. By trading "*for the account*" the buying and selling brokers agree, with every other member of the Stock Exchange who enters into said account, that the manager of the Stock Exchange as the agent for all the parties may, each day, clear the trades made in "*the account*," so that upon the expiration of the day following the sale, the stock sold will be deliverable to whoever, by the system, may appear on the sheet as being the purchaser in the clearing house for an equivalent amount of stock. On the next day similar action takes place, and upon the "delivery" day whoever is in the clearing house as the purchaser, for the number of shares contracted to be sold, stands ready and is obliged, by the

rules of the Stock Exchange, to take the shares of stock from the broker of the seller first spoken of. Margins are kept up in the meantime, and the daily difference between the selling price and the clearing house price is paid in from day to day by the purchaser or the seller, as the stock may decline or rise in value, so that the margins deposited may always be kept intact at $10 per share. The transaction in itself is equivalent to broker A employed by the outsider to sell, saying to broker B, with whom he makes a contract, and to all other members of the Chicago Stock Exchange who go into the clearing house: "I contract to sell to B and to whoever shall, through my agent, the manager of the clearing house, be found upon the "account" day under contract to buy shares of stock, equivalent to the shares of stock I have this day contracted to sell B." On the contrary, the buying broker says to the selling broker, and to his undisclosed principal, in effect, "I will buy from you so many shares of stock for future delivery, but I retain the right to have my trades cleared in the clearing house, and upon the "account" day there will be ascertained by our mutual agent, the manager of the clearing house, myself or some one in my place who will take the stock so contracted to be bought by me."

The convenience of this system has been remarked upon and approved in *Fowler et al.* v. *New York Gold Exchange Bank*, 67 New York, 138.

The system is described in *National City Bank* v. *New York Gold Exchange Bank*, 101 New York, 595.

The objection that by this substitution of buyers and sellers there is no contract with any one, though specious, is really without merit, as shown in the Illinois cases above referred to.

This same objection was disposed of at an early date by the English courts. A case involving the practice on the London Stock Exchange, quite similar to the account system as carried on in the Chicago Stock Exchange, was considered by the House of Lords in 1875, in *Nickalls* v. *Merry*, L. R. E. & I. App. Cases, Vol. 7, p. 530. According to the then existing rules and usages of the London Stock Exchange, the outsider, through his broker, a member of the Exchange, would sell to another broker, also a member of such Exchange, shares of stock to be delivered on the account day. The buying broker on the day preceding the account day (usually called the name day), was bound to pass to the selling broker a ticket containing the name of the person or of several persons as the purchaser or purchasers of the said shares, or he might, if he pleased, pass his own name as such purchaser, in which latter case only would he have bound himself to take the share. Until the name day it was not seen who might stand ultimately, either as purchaser or seller, or, in other words, who might be the person to transfer or take the shares. Until then the buying broker may have had a great many transactions, both buying and selling, with the same brokers, or with various brokers. On the name day, in the case supposed, if the buying broker, having purchased, had sold again, a ticket containing the name of the person to whom the shares were to be transferred would have been issued by and passed on from the ultimate buying broker to his seller, and so on through the hands of the other intermediate sellers and buyers of stock, who had dealt in the shares, until it reached the hands of the original selling broker. In this way it sometimes happened that the same ticket passed through

the same parties' hands several times in fulfillment of bargains made with other members. The original selling broker was not bound to deliver and transfer shares to the ultimate purchasing broker until the expiration of ten days after the account day. During this interval he might object to the parties named by his buyer, and a committee of the Stock Exchange would decide as to the validity of any such objection, and might require another name to be given, in case they considered it right to do so; but after the lapse of these ten days the selling broker was required to deliver the certificates and transfers of shares to such ultimate purchasing broker.

Speaking of the sale thus made Lord Chelmsford said:

"The contract upon which the question arose, having been made between a broker and a jobber, members of the stock exchange, the usage of that body entered into and to a certain extent determines and governs the nature and effect of the contract. The jobber's (the purchasing broker) contract therefore is of this description. It is at first a temporary and conditional contract, but it becomes absolute upon his failure to furnish by the name day the name of a person capable and willing to become the transferee of the shares, so that the seller, by executing a transfer, may make with him a new contract in substitution of the original one with the jobber."

Lord Hatherly said:

"It has been contended on the part of the appellant, and so far justly contended, that the person employing a broker on the Stock Exchange to sell shares in that market, which has been established for the sale of shares, must be taken to conform with the usages and customs which have been established by the parties in that market as among themselves, for the general conduct of their business. It must be supposed to intend that his share shall be sold subject to that condition. So far, well and good. But

then, what is the condition? Nobody denies that when a broker sells shares for his principal (who is what is called an 'outsider' and who has employed him to sell the shares) to anybody in the market, there is a good and valid contract made between these parties—that is to say, between the person whose shares are to be sold and the broker who purchases those shares for the vendor's broker. There is a contract, and that contract must be fulfilled. It must be a contract with somebody, and it must be fulfilled, in the first instance, by him who made it—that is to say, by the jobber. But there is open to the jobber, according to the practice and custom of the Stock Exchange (and there it is that the practice of the Stock Exchange comes in) the option of saying, I will give to you the name of a person who has authorized me to give his name instead of my own, and who will perform my contract for me, and when that name is given to you you shall have an opportunity of inquiring into that person's name (ten days I think is the time allowed for such inquiry), and you shall thereby satisfy yourself that the person I name is a person whom I may reasonably propose to you as the person who is to perform the contract which I have with your broker; after which, the contract which I have made will cease, and if he is a person whom it is reasonable for me to substitute for myself as contracting with you, you shall have the means to satisfy yourself as to his responsibility in point of means to fulfill that engagement which I have taken upon myself. NOW THESE ARE VERY REASONABLE RULES OF THE STOCK EXCHANGE, and nobody can find fault with them, for the very enunciation of them implies that there is a contract to be transferred, and that there is a person to whom that contract is to be transferred and can be transferred." *Ibid.*, p. 546–547.

In the *Nickalls* case, just as in the account system, a contract was entered into by the selling broker with the ultimate buyer, whereby, through the instrumentality of certain other persons, whoever they may be, certain shares shall be sold and bought,

and an undertaking was entered into to complete the contract with the person, whoever he may be, who was found under the account system to be the buyer on delivery day. It is immaterial to the seller to whom the shares are to be delivered, as it is to the first buyer, to know from whence they came. The fact that under the English system the name presented on name day must be acceptable to the seller, or, he demurring, to the Stock Exchange committee, does not affect the principle which governs the validity of such a transaction.

The Nickalls case is cited with approval by the Supreme Court of the United States in

Irwin v. *Williar*, 110 U. S., 499, and
Bibb v. *Allen*, 149 U. S., 490.

Maxted v. *Payne*, Law Rep., 6 L. R. Exch., 132, cited in petitioners' brief, is to the same effect.

Blackburn, the author of Blackburn on Sales, in speaking of a similar contract, says:

"The undisclosed principals of those two members can, at law, enforce, and are by law liable for, the contracts made by their agents."

Ibid., 147.

At page 151 he says:

"What difference does it make that the contract was on the Stock Exchange *for the account*. I have no doubt that the plaintiff, now seeking to enforce the contract made on his behalf, must take the contract as it really was, incorporating in it all the usages relative to said contracts, and the questions—what are those usages—what is their extent and what do they mean—are all questions of fact to be ascertained by evidence, but when once they are ascertained the legal effect of the customs upon the contract is a question of law."

He continues:

"There may be a great many intervening members between the two. The ticket, which the member A holds at the name day, bearing on it the name Z as the original issuer and which contains the name and address of one, a member or non-member, or the person into whose name Z intends the shares to be transferred, may have passed through the hands of as many members as might be designated by all the intervening letters of the alphabet, and may have been split a dozen times, and the issuing member may have been a jobber or broker, and the intervening members may have been brokers or jobbers, or both, and the holding member may be either a broker or jobber—still the result will be that the holder of that ticket is brought in contact with the issuer of it, and both must necessarily be members of the Stock Exchange."

He concludes his instructive opinion as follows:

"If the parties entering into this contract were agents (as Sandiman & Co. were for Mexted; Foster & Co. were for Spry), I appehend their principals, though undisclosed and unknown, would be parties to the contract, and would be subject to the same liability as their agents, and entitled to have the same benefit of the contract. * * * And the convenience of it, in the present case, may be made clear by supposing that A, holding a ticket issued by Z, which had passed through the hands of members, whom we may designate by the other letters of the alphabet, and that Z, without any valid reason, refused to pay. If there is no privity between A and Z it will be necessary, in order to enforce the performance of Z's duty, for A to sue B, B to sue C and so on until, ultimately, Y will sue Z before Z, at the expense of twenty-five law suits, be compelled to do his duty by a process very troublesome and costly; whilst, if there is a privity between A and Z, it may be enforced by a direct suit between those parties; and this imposes no hardship upon the issuer of the ticket, as it only places him in the same position relatively to the holder of it in which he would have stood towards his first vendor, if that vendor had never passed away

the ticket but had himself delivered the shares direct. * * * It seems to me that the ultimate novation of the customer must be between the members, and when it takes place it puts the member issuing the ticket under an obligation to fulfill exactly that duty which, before that novation, he would have had to fulfill to the member with whom he had originally contracted." *Ibid.*, pages 166 and 180.

In *Hodgkinson* v. *Kelly*, L. R., 6 Eq., 496, Romilly, M. R., said:

"It is in my opinion an engagement entered into by A on one side and E on the other that, through the instrumentality of certain other persons, whoever they may be, certain shares shall be sold and bought, and they undertake to complete the contract with the person, whoever he may be, who buys on one hand and sells on the other."

These authorities conclusively establish a privity of contract between Clews & Co. and Jamieson & Co. The facts in the case at bar leave no room for the application of the doctrine announced by this court in *Irwin* v. *Williar*, 110 U. S., 499, that the usage of the Stock Exchange would not be binding upon an outsider, unless he actually knew of such usage. The custom is certainly binding upon Jamieson & Co. They were members of the exchange. It was certainly binding upon and known by Clews, because Clews expressly directed that his trade should be made "*for the account*," employing the technical terms to describe the transaction, which the rules above referred to provide the machinery for carrying out.

A man is presumed to intend the necessary result of his own actions and words. And Clews is presumed to know what dealing "*for the account*" is, when he directs a sale to be made by a Chicago broker in the Chicago stock market "*for the account.*"

For these reasons, we feel that this court should grant the petition for *certiorari*, in order that it may investigate and determine these two questions, so that the members of stock exchanges throughout the country, and those dealing with them, may know whether, despite the authorities in Illinois and everywhere else, it is the doctrine of the Federal courts that all such transactions are gambling *per se*, and are not enforceable for lack of privity of contract.

Respectfully submitted.

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Solicitors for Edwin G. Foreman et al., composing the Governing Committee of the Chicago Stock Exchange.

2028

No. 245.

By. of McConnell v. Jamieson

Respondents.

Office Supreme Court U. S.
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Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 245.

HENRY CLEWS ET AL., *Petitioners,*
vs.
MALCOLM M. JAMIESON ET AL., *Respondents.*

Certiorari to Circuit Court of Appeals, Seventh Circuit.

BRIEF FOR RESPONDENTS, JAMIESON & CO.

SAMUEL P. McCONNELL,
HORACE KENT TENNEY,
M. LESTER COFFEEN,
CHARLES F. HARDING,
JAMES H. WILKERSON,
SOLICITORS FOR SAID RESPONDENTS.

25283

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1900.

No. 245.

HENRY CLEWS ET AL., *Petitioners,*
vs.
MALCOLM M. JAMIESON ET AL., *Respondents.*

Certiorari to Circuit Court of Appeals, Seventh Circuit.

BRIEF FOR RESPONDENTS, JAMIESON & CO.

STATEMENT OF THE CASE.

This is one of those cases whose main difficulty lies in separating the ultimate propositions upon which the rights of the parties depend, from the entangling mass of minor facts. Such effort of counsel as is to be of material assistance to the court must, therefore, be directed toward simplifying the statement of the real issues.

THE FACTS RELATING TO THE FORMATION OF THE ALLEGED CONTRACT BETWEEN THE PETITIONERS AND JAMIESON & CO.

The theory of the petitioner's case is that they had a contract with Jamieson & Co. for the sale to the latter of 700 shares of stock, that Jamieson & Co. refused to accept the stock, which was thereupon sold at a loss of $64,400, for which sum a recovery is sought. The claim as thus

stated is plainly a mere legal demand, and the jurisdiction of equity is asserted upon the ground that there is a fund in the hands of the governing committee of the Stock Exchange as security for the performance of the contract, upon which fund the complainants wish the decree for their damages to operate.

It is important to know at the outset the theory of this claim as put forward in the bill: for the complainants are bound by those allegations, and are not permitted to make one case by their pleadings and another by their proofs. Unless the theory of the bill was sustained by the evidence the decree dismissing it was right and could not be reversed.

Turning to the bill we find its statement of the contract on which the suit is based to be as follows:

That Clews & Co. in July, 1896, the day not being stated, directed their brokers, Schwartz, Dupee & Co., to sell for them 700 shares of Diamond Match stock, deliverable on August 31st; that on August 3d the brokers sold on the Stock Exchange *1,150* shares to Jamieson & Co. at $222 per share; that the sale was made in the broker's name, but as to 700 of the shares they were acting for and in behalf of Clews & Co., and as to the other 450 shares were acting for other clients. (*Trans., p.* 55.)

It will be noted that the bill makes no mention of a sale for the July account, and states in unequivocal terms that the order for the sale for the August account was filled by *a sale on August 3d.* There were thus, by the allegations of the bill, only two steps in the formation of this contract, an order to the brokers, and its fulfillment by a sale on August 3d to Jamieson & Co. in which Clews & Co. and some unknown persons were the undisclosed principals.

We call attention here to this direct and simple allegation of the bill because of its wide variance from the elaborate scheme of evidence by which it was sought to be established. The evidence concedes the allegations of the bill to be false. For the sale of 1,150 shares on August 3d was not the sale which the brokers made for Clews & Co., but was, at best, the resultant of two separate sales made for Clews & Co. and a large number of sales made for other persons. And it is only by taking those sales into consideration that we reach the transaction of August 3d at all. And the sales which the brokers made after getting the order, and which they reported to their principals are not counted on or so much as referred to in the bill.

In stating the facts as to those sales we omit, for the present, the sales for the July account, for by the express finding of the master, to which petitioners took no exception, and by the necessary effect of the transaction, the changing over of the July sales to the August account "balanced the sales on July account and left the brokers with sales made for complainants of 700 shares of the stock of the Diamond Match Company for the August account." (*Trans., p.* 37.) And this is the testimony of the petitioner's witness, Mr. Comstock. (*Trans., p.* 105.)

There never was a sale of 700 shares either ordered by Clews & Co. or made for them by Schwartz, Dupee & Co., nor any sale made by the process of substitution in which that number was the subject of the sale. The allegation of the bill that there was either an order or a sale for that number is concededly untrue. The orders which were given and the sales which were made were two entirely separate transactions, on different dates, one on

July 25th of 500 shares and the other on July 27th of 200 shares. Of course these amounts, added together, make 700 shares, but as we are taking up now the facts which relate to the contracts which Clews & Co. authorized and Schwartz, Dupee & Co. are said to have made, it is important to bear in mind that the transactions upon which the petitioners rely did not even start with such a contract as they allege in their bill.

The sale of the 500 shares for the August account on July 25th is shown by the stipulation of facts to have been effected on the exchange by sales to four different parties of amounts aggregating 500. One of these parties was Jamieson & Co., who bought fifty shares, and they were thus parties, but not the only parties, to this initial transaction. (*Trans., p.* 67.) Stopping the transaction at this point, we have four different sales at the same price, Jamieson & Co.'s purchase involving only fifty shares. This transaction is somewhat simplified by the fact that the entire sales by Schwartz, Dupee & Co. on that day for the August account, *were limited to the 500 shares which they sold for Clews & Co.* (*See their statement in the stipulation of facts, p.* 67.) In this respect the 500 share sale on July 25th differs essentially from the 200 share sale on July 27th, the next business day, and this shows the importance of keeping these transactions separate, if we are to have a correct understanding of their ultimate effect in forming a *contract between Clews & Co. and Jamieson & Co. for 700 shares.*

The only sale for the August account made by Schwartz, Dupee & Co. at $299 on July 27th (the date and price of the 200 share sale) is stipulated to have been a single sale of *350* shares to *R. A. Peters.* (*Trans., p.* 70.) And it is said that 200 shares of this amount were sold for

the complainants. (*Trans., p.* 77.) That sale, however, was at once offset by a *purchase* from the same buyer, Peters, *of the same shares at the same price.* And in their clearing house sheet of that day Schwartz, Dupee & Co. *entered these two transactions as cancelling each other, and leaving them liable to deliver only the stock called for by other trades.* (*Trans., p.* 70.)

Stopping this transaction here we see that by the conceded facts Schwartz, Dupee & Co. did not sell 200 shares for Clews & Co., either by making a contract with one broker, for that number, or several contracts with different brokers for shares aggregating that number. They made one sale of 350 shares and canceled it by a counter-purchase at the same price from the same person.

That this 200 share sale was thus extinguished substantially at the time of its inception is also shown by the subsequent dealings of Schwartz, Dupee & Co. with, and through, the clearing house. On their clearing house sheet of that day they entered the balance of their shares sold for the August account as 500, which was the result of two *substituted* transactions from the previous day *at a different price,* $228. (*Trans., p.* 70.) In their sheet for the next day, July 28th, they carried forward these 500 substituted shares, the other entries of that day being new sales to other brokers. (*Trans., p.* 71.) Thus, by their own statements, and by the admitted facts, Schwartz, Dupee & Co., at the end of July 27th, the day when the sale is claimed to have been made and on which it was reported to Clews & Co. as made, which brought the latter's sales up to 700 shares, did not have outstanding contracts *with any one* for more than 500 shares. In other words, the 200 share sale, which is just as essential to the peti-

tioners' case as the 500 sale, never got into the clearing house as an existing contract which was or could be, by the process of substitution, imposed upon Jamieson & Co. or any one else.

That this was the effect of the transaction appears also from the testimony of the petitioners' witness Mr. Wilkins, the chairman of the clearing house, and from the master's finding. Mr. Wilkins having testified that substitutions were made only with members who have stock in the clearing house, said:

> "Every stock that goes in the clearing-house, Diamond Match, take for instance, any man who puts a sheet in to-morrow morning with 100 shares would have to put a certified check in of $1,000; *that is unless his sheet balanced.* If he had 100 shares of stock bought and 100 sold, and simply the difference to draw out or put in, he wouldn't put any margin in *because he wouldn't have any stock in the clearing-house;* but if there *is anything open on his sheet,* he would have to put in a thousand for every hundred shares of stock." (*Trans., p.* 116-7.)

To sum up the application of these facts to the petitioners' case.

The essence of their theory is that *their* sales of 700 shares became, by the workings of the clearing-house, imposed by substitution upon Jamieson & Co. It is of no consequence that *other* sales of Schwartz, Dupee & Co., or trades of their other clients, or trades of other brokers, became ultimately imposed upon Jamieson & Co., so that the latter were bound as purchasers under a valid contract. The petitioners' rights depend upon the fact that *their* contract either alone or with others, ran that course. And this necessarily involved the continued *vitality*—if not the continued *identity*—of the contract which their

agents made in their name. If Schwartz, Dupee & Co. made a sale for Clews & Co., *but did not put it into the clearing-house,* then it obviously did not form any part of the shifting balances out of which was evolved the substitution of 1,150 shares to Jamieson & Co. on August 3d. Or if, having made the sale they extinguished it by a counter-purchase from the same buyer at the same price, and put it on their clearing-house sheet not as an open trade *to be* settled by the clearing-house, but as one which their own transactions had already settled, the same result followed. For in such case there would be nothing on which the substituting machinery of the clearing-house could operate. It was therefore essential that Schwartz, Dupee & Co. at the close of the day on which they made the second sale for petitioners—the one which brought their sales up to 700 shares—or at the opening of the next day, should have sales outstanding *for at least 700 shares,* and should have put those sales into the clearing-house for settlement. If their outstanding sales were less than 700 shares, then clearly those sales could not include 700 shares for Clews & Co.

The conceded fact is that, even after making the 200 share sale, Schwartz, Dupee & Co. had and put in the clearing-house existing contracts for only 500 shares; and that their outstanding sales were not increased beyond that amount until July 28th, the day after their last sale for Clews & Co.—*and then only by new sales for different customers.*

This concrete illustration from the facts relating to the inception of the petitioners' contract shows somewhat more clearly the application of the statements in the stipulation of facts as to the effect of these clearing-house substitutions. The provisions of that stipulation seem to

have been overlooked by counsel for petitioners in formulating their theory of the case.

Their theory is that Clews & Co. as undisclosed principals, are parties to, and can therefore enforce, the contract of sale which their brokers make for them; in other words, that it is a contract in which they are sellers and the other broker, or his principal, is the buyer. Upon this theory the four sales which Schwartz, Dupee & Co. made for them on July 25th to four different brokers, involving in all 500 shares, were in effect so many contracts which Clews & Co. could enforce against the buying brokers, or their principals.

The next part of this theory is that, by the operations of the clearing-house the buyer, the number of shares and the price, changed each day, but the seller always remained the same, and entitled to enforce the contract. Plainly, if the original contract continued in force as to the principals, then those principals were not parties to the so-called substituted contracts which their brokers made; these two things are clearly inconsistent. There could not be in force at the same time both the original contract of sale and one which was substituted for it. Yet that the original contract continued in force *so far as the principals, Clews & Co., were concerned,* is an admitted fact. We quote from the stipulation:

"That the transactions heretofore set out in this stipulation of purchase and sale by Schwartz, Dupee & Co., Jamieson & Co., and the other brokers whose names are stated, with the exception of those transactions which are marked as substitutions, were had by the brokers on behalf of different clients or principals whom they represented, *and those transactions, so far as the different*

principals are concerned, were not settled or canceled by any of the substitutions, nor by any of *the settlements between the brokers,* except so far as where one client or principal of a broker was through such broker, both a purchaser, and a seller. In other words, the settlements by substitutions or otherwise through the clearing-house *were merely settlements between the members of the stock exchange, and were not settlements or cancellations of the contracts between the principals whom the brokers represented and the brokers themselves,* except where the same broker had both purchased and sold for the same client." (*Trans., p.* 78.)

Applying the facts thus admitted to the specific sales upon which petitioners' entire case is based, we have this conceded result:

On July 25, 1896, Clews & Co. made through their brokers, Schwartz, Dupee & Co., four contracts of sale at the price of $229, with the following named brokers, viz.:

50 shares	Jamieson & Co.
50 shares	King, Alward & Co.
100 shares	Wilson & Sturges.
300 shares	Wm. G. Wasmansdorf.
500	

(*Trans., p.* 67.)

On July 27th they included a sale of 200 shares at $229 in an entire contract with R. A. Peters for 350 shares. (*Trans., p.* 67.) [We state the fact in this way, and leave out the purchase back of this stock from Peters on the same day, so as to put the transaction in its strongest form for petitioners.]

These contracts, by the express language of the stipu-

lation, were not, so far as the principals on either sid
were concerned, settled or canceled by any of the substi
tutions, or the settlements between the brokers; they wer
"merely settled between the members of the Stock Ex
change," and not between the principals whom they rep
resented, or between them and the principals on eithe
side. Notwithstanding the substitutions Clews & Co. had
not only on August 3rd, but on August 31st, enforceabl
contracts with each one of the purchasing brokers an
their principals for the number of shares which they ha
bought. And, reciprocally, each of those brokers, an
their respective principals, could enforce against Clews &
Co. the obligation to delvier the stock according to th
original terms of a contract, whose binding force is con
ceded to have remained unimpaired by the subsequen
events.

The exact contrary of these admitted facts is stated b
petitioners' counsel in their brief and made the basis o
their entire argument. The statement in their brief is a
follows:

"9. So that when the contract of July 25th, at $22
per share, through these daily novations and substitutions
had merged into the contract of August 3rd at $222 pe
share, *all prior contracts had been canceled* and *annulled*
that Jamieson & Co., representing as it now appears, J. H
& W. H. Moore, had then agreed to purchase the 70
shares of stock sold by Henry Clews & Co. throug
their brokers, Schwartz, Dupee & Co., and receive an
pay for them on the 31st day of August $222 per share."
(*Brief, p.* 24.)

They thus proceed upon the theory that the origina
contract of sale made by Clews & Co. as undisclosed prin
cipals was canceled by the substitutions, and this, th

foundation of their argument, is destroyed by their stipulation of facts.

This stipulation, it will be noted, was made as one of the terms upon which petitioners were permitted to amend their bill, after the evidence was closed and the master had filed his report. The evidence did not support the allegations of the original bill, and this amendment was a necessary one. The original bill alleged that they directed Schwartz, Dupee & Co. to sell 700 shares for delivery on August 31st, and that they filled the order by selling *700* shares on August 3d. (*Trans., p.* 3.) That the transaction of August 3d, whether treated as an original or a substituted sale, was for 1,150 and not 700 shares, was of course shown when the evidence was taken. They therefore amended their bill by abandoning the allegation that their brokers made for them on August 3d a contract for the delivery of 700 shares, and alleged that the contract was for 1,150 shares, and that the brokers were acting for them as to 700 shares, and for other parties as to the other 450 shares. (*Trans., p.* 55.) The answer of Jamieson & Co. to this amended bill denied that on August 3d Schwartz, Dupee & Co. sold them any stock *as agents for complainants;* alleging that the substitution of 1,150 shares by the clearing-house on that day did not substitute them as purchasers in any contract made by Schwartz, Dupee & Co. as agents for complainants, but was a mere settlement between the brokers for their own convenience, and without affecting in any way the rights or liabilities of the principals whom said brokers represented, and for whom they had made such purchases and sales." (*Trans., p.* 61.)

These allegations of the answer are stipulated to be

true. The case then on the bare record is reduced to this:

1. The complainants allege in their bill a sale made by their brokers to defendants on August 3d of 1,150 shares, of which 700 were sold for them, stating it as an original transaction and saying nothing about prior transactions or substitutions.

2. The defendants deny making such a contract.

3. The complainants seek to prove the allegation by showing that prior contracts were made and that this new contract was substituted for those, and canceled them.

4. The defendants allege that those prior contracts were with other parties, that they have not been canceled, and still bind the parties to them, including the complainants.

5. The complainants, their brokers, Schwartz, Dupee & Co., and the governing committee of the Stock Exchange, join with Jamieson & Co. in stipulating that this is true.

THE RULES OF THE STOCK EXCHANGE WITH REFERENCE TO ENFORCING AND ASCERTAINING THE DAMAGES ON DEFAULTED CONTRACTS.

THE FACTS CONNECTED WITH THE FICTITIOUS SALE MADE BY THE PETITIONERS FOR THE PURPOSE OF FIXING THEIR DAMAGES.

In addition to the legal obligation of the seller to make a tender of the property the rule of the Exchange required such tender and fixed the hours for delivery. (*Rule VII.; Trans., p.* 32.) In this case the tender was made by Schwartz, Dupee & Co. of 1,150 shares, and no tender was ever made of 700 shares, even after Schwartz, Dupee

& Co. had, about ten days subsequent to the delivery day, informed Jamieson & Co. that Clews & Co. were interested to that extent. The shares which were tendered did not, nor did any part of them, belong to the petitioners. (*Trans., p.* 137.)

The rules of the Exchange with reference to the closing and enforcement of defaulted contracts and the notice required for that purpose were as follows:

ARTICLE VII.

Hour for Delivery of Securities—Payments.

"Section 1. All deliveries of securities must be made between 11 A. M. and 1:30 o'clock P. M., or the buyer may demand that they shall lie over until the next day without interest, when they shall be delivered before 10:30 o'clock A. M., *and when deliveries are not made by that time the contract may be closed under the rule after due notice to the defaulting party as provided in Article XVII. of the by-laws.* Such notice must be given, however, not later than 10:45 o'clock A. M., and the contract must be closed without delay unless the time for so doing be extended by mutual consent. In all cases certified checks on national or state banks must be given in payment of all securities delivered.

ARTICLE XVII.

Default—Closing Contracts Under the Rule.

Should any member neglect to fulfill his contract on the day it becomes due, the party or parties contracting with him shall, *after giving notice as required by section 2 of the preceding article, employ any officer of the board to close the same forthwith in the Exchange by purchase or sale as the case may require,* unless the price of settlement has been agreed upon by the contracting parties. *In case*

of a failure of a creditor to close the contract as above, the price shall be fixed by the price current at the time such contract ought to have been closed under the rule. In all cases where an officer may be directed to buy or sell securities under this rule, the name of the member defaulting, as well as that of the member giving the order shall be announced. No order for the purchase or sale of securities under this rule shall be executed unless made out in writing over the signature of the party giving the order, who shall state the reason therefor, and it shall be the duty of the officer who executes the order to endorse thereon the name of the purchaser or seller, the price and the hour at which the contract is closed, and hand the same to the secretary of the board, who shall, within twenty-four hours, ascertain whether the party for whose account the order was given has paid the difference, if any, arising from the transaction; if not, the secretary shall report the default to the president. The duty devolved upon the officers of the Exchange, under this rule, shall be performed without charge. *No party shall be permitted to supply offers to buy or sell securities closed for his account under the rule;* and when a contract is closed under this rule, any action of the defaulter, direct or indirect, by which the prompt fulfillment of such contract is delayed, hindered or evaded, to the detriment of the other contracting party, shall subject the offending party to suspension for not less than thirty days, in the discretion of the governing committee, by a two-thirds vote of the members present at the meeting. When contracts are closed out under the rule, any member supplying the bid or offer, and not duly receiving or delivering the stock, as the case may be, renders himself liable to prosecution under this article. Should any stock thus sold not be

delivered until the next day, the contract shall continue, but the defaulting party shall be liable to pay such damage as may be assessed by the arbitration committee. The same rules as to notice, time and place, that govern defaults in other contracts, shall apply to borrowed securities, which, on non-delivery or receipt, must be borrowed or loaned in open market, except in case of actual default in receiving or delivering after notice, to close the loan; then the same are to be bought or sold, as the case may be, for account of the defaulter in the manner provided in this article."

The provision in the preceding section (XVI.) as to notice which is referred to in this rule was as follows:

"The notice above referred to shall be either personal or shall be left in writing at the office of the party to be notified, or in case he has no office, then by public announcement whenever the Exchange may be in session."

Section 2 of Article XXVIII. clearing-house rules provides as follows:

"Deliveries of cash, stock or transactions for 'the account' shall be made on the last day of each month. Provided, however, that should the last day of any month occur on a holiday, *or on a day when the Exchange is closed for business,* then in that case deliveries shall be made on the *first business day preceding.*" (*Trans., p.* 34.)

This theory of the petitioners' case is based upon the proposition that the rules of the Stock Exchange form part of their contract. That contract is therefore to be taken as having the following special provisions with reference to the action of the parties, and their rights in case of default:

1. The seller should, after giving notice, request in writing, an officer of the board to sell the stock on the Exchange, and thus determine the market price.

2. If this was not done the price should be fixed by the price current at the time the contract ought to have been closed under the rule.

We shall discuss in another part of this brief the question of the construction of these provisions of the contract: whether the "price current" means the price when sales are made on the exchange, or the market price without reference to the place of sale; whether, the Exchange being closed under the rule, the price current on the last business day when it was open is to govern; and whether, if a sale is made for the purpose of fixing the price, it can be made on the street by one who is not an officer or even a member of the Exchange, but an outsider. At present we are simply showing the facts with reference to the provisions of the contract, and the acts of the parties under it.

There was no attempt to comply with any of these provisions of the contract; no effort made to get an officer to make the sale either on the Exchange or elsewhere, no evidence offered as to either the market value or the "price current" on August 31st. The bill makes no allusion to these rules or provisions of the contract, or to the closing of the Exchange, and thus does not proceed upon the theory that the petitioners were prevented from complying with them, but upon the theory of performance of all that the contract called for. The rules are set up in the answer as forming part of the contract, and they are admitted.

The sale which was pleaded in the bill and upon which

petitioners rely as fixing the amount of their damages, was made on September 22nd, and the notice was served on September 10th. The sale and the notice, though purporting to be based upon a contract for 1,150 shares, covered only 700 shares. In the face of the rule which specifically provided that "no party shall be permitted to supply offers to buy or sell securities closed for his account under the rule"; and that "no fictitious sales shall be made" (*Trans., pp.* 31, 33), Clews & Co. not only supplied a buyer, but a fictitious one, and went through the form of selling the stock to him. They arranged with Mr. Gage, one of the defendants in this case, to act as ostensible buyer (*Trans., p.* 45), gave him instructions as to the amount of his bid, authorizing him to bid up to $135, and the bid which he made *was not even as high as his instructions warranted.* (*Trans., pp.* 132-3.) A responsible *bona fide* bidder offered $135 per share for 200 shares, but this bid was rejected unless he would furnish a bid for the balance of the 700 shares. (*Trans., p.* 129.) As Clews & Co. had their own bidder there with instructions to bid up to $135 if necessary, this was plainly a mere pretense, and a method of enhancing the apparent damage which they hoped to collect from Jamieson & Co. If their pre-arranged bidder had bid for the remaining 500 shares only the $130 per share which he had already offered, it would have made a difference of $1,000 in favor of Jamieson & Co.

The conceded facts about this sale show that it was a mere fictitious transaction.

1. Neither the 1,150 shares which were tendered to Jamieson & Co. on August 31st nor the 700 which were sold on September 22d belonged to Clews & Co. They were brought by Mr. Conley of Schwartz, Dupee & Co.

for the purpose of having them present at the sale, but with the understanding with the attorney of Clews & Co. that "if the purchaser at this auction sale should take this stock which Schwartz, Dupee & Co. had furnished for the purpose of this sale, then Clews & Co. were to substitute their stock of a like amount in place of the stock sold." In other words, if there was no sale they were not to part with even the temporary possession of the shares.

2. Mr. Gage, the ostensible purchaser, was employed to bid by Mr. Waggoner, the agent of Clews & Co. The stock was not delivered either to him or to Waggoner, nor did he pay, either to the complainants, Schwartz, Dupee & Co., or any one else, the pretended purchase price. On the contrary, Mr. Comstock, the stock clerk of Schwartz, Dupee & Co., testifies that the stock was "all the time the property of Schwartz, Dupee & Co., and in their possession both before and after the sale." (*Trans., pp.* 137-8.)

3. This fictitious sale was to be the basis of a suit against Jamieson & Co. and therefore the parties went through the form of making documents which would give an appearance of reality to it. The attorney of Clews & Co. gave to Gage a memorandum "sold to Frank N. Gage 700 shares of Diamond Match stock numbered A680-686, inclusive, at $130 per share." Mr. Gage thereupon wrote on this an order—not addressed to anyone—to deliver the stock to Mr. Waggoner and accept his check in settlement; the memorandum with this endorsement was *then delivered back to the attorney for Clews & Co.* and he delivered it to Mr. Waggoner, with an order on Schwartz, Dupee & Co. to deliver the stock to him, on payment of $130 per share. (*Trans., pp.*

137-8.) And there the transaction stopped; the order was never presented, the money was never paid, the stock was never delivered, and the title, which was ostensibly divested by a sale, as well as the possession, remained where it was when the performance began.

THE POSITION OF THE GOVERNING COMMITTEE OF THE STOCK EXCHANGE IN THIS CASE.

When the application for a *certiorari* was made in this case and after our brief in opposition had been filed, a brief was filed on behalf of the Governing Committee of the Stock Exchange in which the court was requested to grant the writ. The case, upon that application, was thus presented as one in which parties on opposite sides of the record united in seeking a review of the decisions of the lower courts. In this brief it is stated that the defendants upon whose behalf it is filed have no interest in the litigation, and appear only for the purpose of procuring from this court a decision which will be of benefit to them in future transactions. The two questions to which this effort are directed are the question of the legality of the contract, and the question whether Clews & Co. were parties to the contract of August 3d between Schwartz, Dupee & Co. and Jamieson & Co. The first of these questions is said to be of interest to the Stock Exchange, as a legal proposition, because trading in the manner which the Court of Appeals condemned is necessary to its prosperity, if not to its existence. Its interest in the question whether the principals in contracts made by its members are *parties* to new agreements made between the members is of an even more abstract character. For its liabilities are not affected in any way by that question, and the decisions of both the lower courts have proceeded

upon the theory that the substitutions through the clearing-house accomplish their purpose and create new contracts between the brokers. Why the Exchange is interested in affirmatively establishing the legal proposition that its members are liable on those contracts not only to the other members, but to outsiders, we have not discovered, and it is perhaps immaterial that we have not.

The other question in this case is whether when the Governing Committee exercises its power of closing the Exchange, and thus prevents its members from either performing its contracts on the Exchange, or observing its rules for closing them and determining the market prices, resort can be had to sales on the street, and even to fictitious sales in open violation of the rules. Upon that question no suggestion was made by counsel for the Governing Committee on the application for the *certiorari*, although it appears, at least to us, that the interests of the members are decidedly in favor of the construction for which we contend. Quite plainly a decision in our favor upon that question alone, would be fatal to the bill, and render unnecessary any decision by this court upon the other questions in which, as abstract propositions, the Exchange is said to be concerned.

In the Circuit Court the Governing Committee demurred to the bill, and the opinion of the court in overruling that demurrer shows that it was based upon the contention that the case was not cognizable in equity. (*Trans., p.* 25.) An answer was then filed, admitting the deposit of the money in the clearing-house, calling for strict proof of the other allegations, denying the complainants' right to any relief, and praying the benefit of a demurrer. (*Trans., pp.* 26-7.)

Mr. Gage, a member of the Governing Committee, and as such a defendant to the bill, acted as the pretended purchaser in the fictitious sale of the stock by petitioners.

We mention these facts here because we have not, in preparing this brief, had the advantage of seeing any brief which this adversary presents against us except that filed on the application for *certiorari*.

BRIEF.

I.

REGARDING THE CONTRACT OF AUGUST 3D, 1896, FOR THE SALE BY SCHWARTZ, DUPEE & CO. TO JAMIESON & CO. OF 1,150 SHARES OF STOCK, AS A COMPLETE AND VALID CONTRACT, IT WAS NOT A CONTRACT TO WHICH CLEWS & CO. WERE PARTIES. THEY WERE PARTIES TO THE ORIGINAL CONTRACTS OF SALE WHICH WERE MADE ON THEIR ORDERS, AND IT IS ADMITTED THAT, SO FAR AS CLEWS & CO. WERE CONCERNED, THOSE CONTRACTS WERE NOT CANCELED OR SETTLED BY THE CLEARING-HOUSE TRANSACTIONS, WHICH ONLY ADJUSTED THE MATTERS BETWEEN THE BROKERS. AS THE ORIGINAL CONTRACT MADE BY CLEWS & CO. REMAINED IN FORCE, THE SO-CALLED SUBSTITUTED CONTRACT DID NOT TAKE ITS PLACE EITHER IN FAVOR OF OR AGAINST CLEWS & CO. THEY COULD NOT BE PARTIES TO BOTH CONTRACTS, AND IT IS ADMITTED THAT THEY REMAINED PARTIES TO THE ORIGINAL CONTRACTS.

Beckhuson v. *Hamblet*, 2 Law Reports, Queens Bench Div., 18.

Higgins v. *McCrea*, 116 U. S., 671.

Irwin v. *Williar*, 110 U. S., 499.

Lehman v. *Field*, 37 Federal Reporter, 852.

II.

THE RULES OF THE STOCK EXCHANGE FORBID THE CLOSING OF A DEFAULTED CONTRACT, OR THE ASCERTAINMENT OF THE DAMAGES CAUSED BY THE BUYER'S DEFAULT, BY A SALE CONDUCTED BY THE SELLER ON THE STREET AND WHILE THE EXCHANGE IS CLOSED. SUCH A SALE BEING IN VIOLATION OF THE RULES, THERE IS NO BASIS SHOWN FOR A RECOVERY.

III.

THE SALE ON SEPTEMBER 22D, 1896, WHICH IS PLEADED IN THE BILL AND RELIED UPON IN THE EVIDENCE AS THE BASIS OF THE RIGHT TO RECOVER, AND AS FIXING THE AMOUNT OF A RECOVERY, WAS A FICTITIOUS ONE, VIOLATING BOTH THE RULES OF THE EXCHANGE, AND THE RIGHTS OF JAMIESON & CO. TO HAVE THEIR LIABILITY, IF IT EXISTED, DETERMINED BY A GENUINE AND NOT A FICTITIOUS TRANSACTION.

THE ACT OF THE PETITIONER IN CONDUCTING A FICTITIOUS SALE WAS AN ACT OF BAD FAITH, WHICH BARS THE RIGHT TO A RECOVERY IN EQUITY.

1 Pomeroy's Equity Jurisprudence, § 397.

IV.

NO RIGHT IS SHOWN TO MAINTAIN A BILL IN EQUITY FOR THE PETITIONERS' RELIEF, EVEN CONCEDING THAT THERE WAS A CONTRACT BETWEEN THEM AND JAMIESON & CO. WHICH THE LATTER VIOLATED.

ARGUMENT.

I.

THE PETITIONERS, CLEWS & CO. WERE NOT PARTIES TO THE CONTRACT OF AUGUST 3D, 1896, EITHER DIRECTLY OR AS UNDISCLOSED PRINCIPALS.

As the rights which are sought to be enforced in this case are purely contractual, we naturally take up first the question whether there was any contract between these parties, such as is pleaded in the bill and made the subject of such extended discussion in the brief. And for the solution of the problems which the case presents we are concerned only with determining whether a contract of sale was created in which Clews & Co. were sellers and Jamieson & Co. were buyers. It matters not what contract Jamieson & Co. had with Schwartz, Dupee & Co. or others, unless Clews & Co. were parties to it, so that the rights and the liabilities which it created could be enforced by them and against them. We may, therefore, for the sake of the argument, assume that the exchange of cards between Schwartz, Dupee & Co. and Jamieson & Co., of cards confirming the clearing-house substitution of August 3d created a valid contract between those parties for the sale of 1,150 shares of stock at $222, deliverable on August 31st. This, however, is not the goal, but the starting point of an inquiry which is directed at the fundamental proposition in the petitioners' case. It does not follow that because there was a contract Clews & Co. were parties to it; nor does that result follow from the fact that Schwartz, Dupee & Co. were their brokers; nor, again, does it follow, from the fact that this contract was the resultant of a number of contracts with Schwartz,

Dupee & Co. and others, to some of which Clews & Co. were parties. This is, if anything, a case of an undisclosed principal: it is so stated in the bill, and that is the theory of the evidence and the argument. To sustain it the contract must have been made by the agent on behalf of the principal, so that the latter was bound by it and could have been subjected to liability on it at the suit of the other party.

Starting with the assumption that on August 3d Schwartz, Dupee & Co. contracted to sell to Jamieson & Co. 1,150 shares of stock at $222, deliverable August 31st, let us examine the facts relied upon to show that Clews & Co. were *parties* to that contract.

To begin with, it is conceded that they never authorized or directed their brokers to sell 1,150 shares or to enter into any contract involving that number; nor did they authorize a sale at $222. All the communications between them and their brokers upon which their rights depend, were in writing, and we know just what they were. From them it is shown that the sales which Clews & Co. authorized for the August account, *and which were reported to them as made,* were of 500 shares on one day and 200 shares on another at $229. So far as the evidence shows they never so much as heard of the contract for 1,150 shares until after its alleged breach on August 31st. By all the ordinary tests of law and business dealings they were not parties to the contract for a greater number of shares at a less price, but the possibility of such a thing is inconsistent with the facts.

But counsel contend that in this case the ordinary rules of law and business give way to the operations of an ingenious machine which constructs contracts for the

ties out of quite indifferent material and without reference to the authority which they have given. It is upon the mechanism of this device that reliance is placed for the production of a contract differing so widely from that which the seller designed to make.

Before considering either the theoretical or the practical workings of the clearing-house, we deem it important to have this fact clearly in mind. When the clearing-house has notified the brokers of the changes which it has made in their contracts, they notify each other of their assent to the new arrangement. There is thus, between the brokers, an actual meeting of minds which would create all the elements of a definite contract, even had there been no clearing-house at all. There was thus, as between the brokers, an actual agreement, or as the circuit judge called it, "a conscious assent"—which was entirely lacking on the part of their principals. This is important in view of the conceded fact that the original contracts to which the principals did assent, *continued in force* as between them, though cancelled as between the brokers.

When a broker receives an order to sell it is his duty to fill it by making a contract of sale for the number of shares specified, and at the price named, or at the market price, if none is named. In doing this he exercises his principal's authority and the latter is therefore bound by the contract. He can enforce it against the buyer, and the buyer can enforce it against him. But if the broker departs materially from his instructions, he does not exercise his principal's authority, and the latter is not bound by a contract in violation of his directions and to which he did not assent. This is held in the case of *Beckhuson* v. *Hamblet*, 2 L. R. (Q. B.) 18, to which more extended

reference will be made. The buyer in such case could not hold the undisclosed seller, for he did not know him in the transaction, and was not misled by any appearance of authority, on the part of an agent who appeared only as a principal.

The same result follows between the principals of the brokers. Each principal can hold the other, where the brokers who made the contract followed the authority of their respective principals. Thus where the authority of the principals on each side is followed, the seller may hold the buyer's broker or the buyer himself, and *vice versa*. The brokers can always hold each other, irrespective of compliance with their instructions because they contract as principals.

Bearing these elementary rules in mind will assist in understanding the effect and the purpose of the clearing-house operations.

The connection between the petitioners and the contract of August 3d for 1,150 shares is based upon the theory that it is the resultant of the contracts which their brokers made on July 25th and 27th; that it was substituted for, and took the place of, the earlier contracts; that by novation Jamieson & Co. became the buyers in those contracts in place of the original buyers who were thus discharged. This plainly and necessarily involves the assertion that the seller constantly remained the same, but the buyer—as well as the price and the number of shares—changed each day.

In tracing this connection between the contract of August 3d and the contracts which Clews & Co. actually did make, counsel go back to the original sales for the July account. And they insist that it is necessary to do so

in order to prove their theory of the facts, and that the fact that the circuit judge treated the sales for the July account as being cancelled shows that he proceeded upon an erroneous theory. (*Brief, p.* 40.) It would certainly seem to follow that if the circuit judge was right, and the contracts for the July account were so cancelled that they did not add to the effectiveness of the August sales, as contracts to which Clews & Co. were parties, then a large part of the basis upon which their argument is built up is destroyed.

It seems to us plain that the fact that sales were originally made for the July account and "changed over" to the August account does not in any way alter the effect of the ultimate contract between the brokers on August 3d, or make parties to that contract any one who otherwise would not be. We shall therefore not attempt to discuss the very elaborate explanation presented by counsel for the petitioners, and by counsel for the Stock Exchange, of the method and the effect of this change. For in the end, and *as the aim* of what is described with great wealth of detail there results the extremely simple fact of a new contract of sale for August delivery. If the parties to the sale for July could reach and deal with each other they could readily arrange a modification of their contract as to delivery by mutual agreement. But as they cannot do so, or one party might not be willing to do so, the seller seeks to accomplish his purpose without reference to the buyer. He therefore sells the same amount of stock to another buyer for August delivery. This new contract obviously, and beyond any question, is binding upon the parties to it according to its terms, whose rigid simplicity are not changed by the purpose which actuated the seller in entering into it. In making this contract he does no

more than he would if he wished to have two sales outstanding, one for July and one for August. But he may not wish to do that, and this elaborate, and somewhat hypothetical scheme which counsel present has reference wholly *to his effort to free himself from the first contract.* This he does by what, in common parlance, is called "buying in" the July stock. But it is entirely immaterial to the buyer of the August stock whether the seller frees himself from the July sale or not; he may not even know that he is attempting to do so, or that he had such a sale. The rights and liabilities of the buyer of the August stock depend upon the terms of his contract, and the acts done under it, unaffected by the seller's prior transactions. Those transactions may have induced the new contract, and may have had something to do with fixing the price on which the parties agree. But the result arrived at is a new contract with a new buyer, made, *not by substitution* or *machinery, but by the actual meeting of minds;* and it is upon that new contract that the rights of the seller must rest.

We therefore regard the effort to press into the semblance of legal forms the successive steps of the process of "changing over" as the presentation of a mere side issue. But we cannot forbear to remark, though perhaps not germane here, that the elaborate scheme of fictitious purchases, sales and hypothetical orders for delivery, which are never issued or filled, all designed to produce a mere settlement of differences, as described by counsel, seems to imply much more of the illegal element which the Court of Appeals found in the transaction, than is required by the simple description of the transaction which we have given.

When we look at the telegrams by which this "change

over" was directed and reported we find the transaction stated, with the terseness of a telegram, just as we have stated it. For Schwartz, Dupee & Co. on being directed to change the 500 "at 2 cents or better" reported that they had done so by buying for the (July) account at $227, and selling for August at $229. And in reporting as to the 200 shares they first wired, "We have changed the 200 Match at 2¼ difference; *will give you prices later,*" and then wired again, "Bought 200 Match 226¾ account; sold 200 2nd account $229. (*Trans., pp.* 103-4.) In each case it will be seen that the "difference" is the excess of the price for August delivery over the price at which the July stock was bought in. And it therefore seems quite unnecessary to follow the discussion of counsel and witness as to whether this difference may properly be called "interest" or "commission" or "compensation."

We start then with the contracts of sale made by Schwartz, Dupee & Co. on July 25th and 27th for August delivery, and the question is whether the seller in those contracts became the seller in the contract of August 3d.

The clearing-house is created for the benefit of the brokers, not for the benefit of their principals. Its purpose is not to make contracts for the principals, but to facilitate the transaction of business between the brokers who contract in their own names. But for the fact that the brokers do so contract and thus assume a personal liability the scheme would not be feasible. It differs essentially from a bank clearing-house, to which counsel liken it, in several important respects. A bank clearing-house adjusts nothing but money balances upon an exchange of checks *which are payable on presentation.* It discharges contracts not by the creation of new ones, but by payment in money. The Stock Exchange clearing-

house, on the contrary, deals with contracts of sale which are neither payable in money, nor matured at the time they are entered in the clearing-house. If it can be truly said that the stock is regarded as a common medium, like money, it is still true that the contracts are for future delivery on which present payment (delivery) is not contemplated as in the case of bank checks.

We have called attention, in our statement of the case, to the fact that the parties to this case have by written stipulation agreed that the settlements and substitutions through the clearing-house are only settlements between the brokers, leaving the contracts of the principals unchanged and unaffected. But aside from this agreed statement of facts, a consideration of the character of the clearing-house substitutions will show that the new substituted contract between the brokers cannot be contracts of the principals.

In the operation of the clearing-house the brokers are treated absolutely as principals; the latter are disregarded and no attempt is made to affect their rights. In line with this theory purchases and sales made by the same broker for different customers are treated as off-setting each other; and purchases or sales which he makes with other brokers are treated as being susceptible either of complete cancellation, by the process of "ringing up" a large number of transactions between different brokers, or as being susceptible of the process of substitution, so that the broker may be directed to deliver stock to, or receive it from, some other than the broker with whom he originally dealt.

Thus, if a broker sells for A 500 shares of stock, and buys the same amount for B at the same price, these trans-

actions are entered on his clearing-house sheet as offsetting each other, so that he is not called upon to either receive or deliver any stock. In such case, in the language of Mr. Wilkins, he has "no stock in the clearing house." If there is a difference in the price of the purchase and sale, it is adjusted by a money payment. Therefore, after a broker has made two such transactions, he comes out of the clearing-house with nothing to receive or deliver, *so far as the other brokers are concerned.* And if he had no further transactions on the exchange after that day, his account in the clearing-house and with the other brokers would be entirely closed.

What, however, has been the result of these transactions upon the rights of his respective principals? If those transactions are affected at all as to the principals, then they are obviously affected in the same manner and to the same extent as they are between the brokers, which, in the case supposed, would be an entire extinguishment. The result of this would be that the buyer and the seller would each lose his contract, from the mere fact that without even knowing it they had happened to employ the same broker.

Suppose, however, that the broker has sold 500 shares for one customer, and bought 400 shares for another; in such case the purchase would balance the sale except to the extent of 100 shares, and his clearing-house sheet would show that balance still deliverable. By the adjustment of the clearing-house machinery he might be required to deliver those 100 shares to either the same broker with whom he made the trade or to some other broker, or even to several brokers. His obligation, however, upon the contract to buy 400 shares would, so far as the other brokers were concerned, be discharged by

this process of off-set. After this substitution of the balance of 100 shares is made the broker makes other purchases and sales, and puts these in the clearing house, together with the 100 share balance resulting from the previous transactions. And these transactions are again adjusted, and the result may be either that the off-set is complete, leaving no balance either way, or that his sales have been greater than his purchases, thus leaving a still larger balance for him to deliver. Or, on the other hand —and this is a most important feature—his purchases may be much greater than his sales, and he thus, as the result of the next day's transactions, may through the operation of the clearing-house, appear only as a *buyer* for a large number of shares.

In these different cases what are the rights of the principals for whom he acted, and what has become of their contracts? There can be no doubt that if the contract of the principal is affected by and follows through these various permutations, it does not—because it cannot—do so in its original form, but the changing situation of the broker each day becomes the situation of his principal. That is the theory of counsel for petitioners, and the theory upon which their case is based.

Even if there were no agreed statement of facts, this proposition involves a plain inconsistency. In the case of a broker buying and selling the same number of shares for two different customers at the same price, neither would have a contract for either sale or delivery; for as between the brokers, the contracts which they made were settled. In the case of the broker selling 100 shares more for one client than he had bought for another, the buyer would have no contract of purchase, and the seller a contract for 100 instead of 500 shares. And in the case

where, by subsequent transactions, this 100 share substituted sale was offset against other purchases, so that the broker stood on the next day solely as a purchaser, the seller's contract even for the balance of 100 shares would be entirely wiped out. And in the last case there would be added—upon the theory of opposing counsel—this result, which is so anomalous as to be impossible; if the original seller, through all these changes becomes each day a party to the new contract which has been evolved between the brokers from his original sale, he thus becomes a buyer instead of a seller.

It must be constantly borne in mind also, that these clearing-house settlements and substitutions do not involve the rights of one buyer and one seller, but the substituted contract is the resultant of the purchases and sales of a large number of different persons. It inevitably happens in many cases that a broker who has sold today a thousand shares for ten different customers will, through the clearing-house settlements, appear to-morrow as a seller for only 500 shares. In such case, which of his principals are parties to the substituted contract? It is plain that there is no offset or settlement of one particular purchase against another particular sale. The identity of each is lost, and the theory of the clearing-house is that it shall not be regarded.

The substituted contract in such a case cannot be regarded as a joint sale by all the ten principals, for half the amount of stock which they ordered sold; no such thing could by any possibility be within the contemplation of anybody. And yet, if any principal is a party to this substituted contract, all are parties.

If we were to admit that the contract thus substituted on the next day for their original sales of 1,000 shares,

was a contract to which they were parties, what shall we say is their position when, through the offsetting of *purchases* made by the broker the following day for other parties, there results a substituted contract in his name, in which he appears only as a buyer? Or in which his account is cancelled, and he has no stock either receivable or deliverable?

If the substituted contract which is made by the clearing-house and confirmed by the broker, is one in which the broker is the agent for his undisclosed principals, and the latter are therefore parties by representation, it necessarily follows that every principal whom he represented in the transactions which finally went to make up this substituted contract, is a party to it, and that it can be enforced, both in their favor and against them. This, of course, means that whatever the substituted contract is—whether a purchase or a sale, and although it is a purchase to-day and a sale to-morrow, all of the principals are parties to it. Surely a theory which seeks to accomplish such impossibilities as to suggest mere jugglery, should be supported by some more direct and binding authority from the principals, than can be implied from a simple direction to buy or sell a specific number of shares at a specific price.

It is always easier to follow a concrete than an abstract case. And to show that the different results thus arrived at are not purely speculative, but the necessary consequence of the petitioners' theory, we call attention to the actual facts with reference to the very transactions involved in this case.

An examination of the different clearing-house sheets of Schwartz, Dupee & Co., beginning with July 25th—

the date of the sale of 500 shares—shows how these stock balances are carried forward. Their clearing-house sheet for that day shows that they sold 500 shares to four different brokers, one of the sales being of fifty shares to Jamieson & Co. As they had no purchases for the August account on that day, this made the balance of their sold shares 500, and it was so marked in their clearing-house sheet. (*Trans., p.* 67.)

Their clearing-house sheet for July 27th (the next business day), therefore, begins with the statement that 50 of the 500 shares have been substituted to U. G. Peters & Co., and the remaining 450 to A. L. Dewar & Co. On that day they made but one sale; this was of 350 shares to R. A. Peters. It will be remembered (as we have shown in our statement of the case), that this was the day on which they made the second sale for Clews & Co. of 200 shares, and this 200 shares, therefore, was included in the 350. But at the same time they bought back the 350 shares from Peters, to whom they had been sold, at the same price. This offset the new sale which they had made, and left them sellers for only the balance of 500 shares resulting from the previous transactions for Clews & Co. Their clearing-house sheet, therefore, on that day shows only this balance deliverable, and the 350 purchase and sale is cancelled. Thus it is shown beyond dispute that at the end of this day, when Clews & Co. had sold 700 shares of stock, Schwartz, Dupee & Co. had in the clearing-house *for their benefit and that of others* only 500 shares. (*Trans., p.* 70.)

On the following day, July 28th, the clearing-house sheet of Schwartz, Dupee & Co. therefore began with this balance of 500 shares, which is shown to have been all substituted to A. L. Dewar & Co. Thus, on the peti-

tioners' theory, there had arisen a contract to which they were parties, obligating them to deliver to Dewar & Co. 500 shares at $225.25, *as the outcome of sales aggregating 700 shares at $229.*

Nor is this all; for if the sales made for the petitioners thus went into the substituted balance, the 150 shares out of the 350 in which their 200 sale was incorporated on the 27th, also went to make up this balance—and the principal for whom those 150 shares were sold was just as much a party to this new contract as they were.

If Schwartz, Dupee & Co. had made no further sales, against whom could the petitioners have enforced a right to deliver 700 shares of stock? There is no doubt that, upon their theory of the case, they could not have enforced such right against any one. On the other hand, could Dewar & Co. have enforced that contract against them, and have compelled them to deliver 500 shares at $225.25, when every share of the 700 which they had sold had been sold at $229? Clearly not.

The transactions, however, of Schwartz, Dupee & Co. through the clearing-house did not stop on July 28th, with this substituted balance of 500 shares as the result of contracts to deliver 850, but on that day they made for new clients and to different brokers additional sales, amounting to 750 shares. But for these sales—in which the rights of new clients were obviously involved—the number of shares deliverable by them would not at any time after July 27th have equalled the number of shares deliverable by the petitioners alone. (*Trans., p.* 71.)

These additional sales, with the 500 substituted from the day before, made a total of 1,250 shares; and their clearing-house sheet for the next day, July 29th, accord-

ingly shows that these 1,250 shares were split up among three brokers—50 being substituted to Brewster & Co., 1,050 to Lobdell & Farwell, and 150 to Jamieson & Co. On that day Schwartz, Dupee & Co. then sold 150 shares to two different brokers, but they bought 300 shares—100 from Brewster & Co. (to whom 50 shares had been substituted from the previous day), and the remainder from other brokers. Their new purchases were thus double the amount of their new sales, and the effect, as entered on their clearing-house sheet, was to make them sellers for only the balance of 1,100 shares, which it will be noted was less than their balance from the previous day. (*Trans., p.* 73.)

On the next day, July 30th, Schwartz, Dupee & Co. sold no stock, and this 1,100 shares which they still had deliverable was substituted—1,050 to Lobdell & Farwell, and 50 to Jamieson & Co. (*Trans., p.* 74.)

On July 31st they made no sales, and the 1,100 balance was substituted—700 shares to Frank & Bro., and 400 to Wilson & Sturges. (*Trans., p.* 75.)

On August 1st they made one sale for 50 shares, and this, with the balance from the previous day, made a total of 1,150, of which 50 shares were on that day substituted to Jamieson & Co., and 1,050 to Raymond, Pyncheon & Co. This was followed by the substitution on August 3d of the entire 1,150 shares to Jamieson & Co., which is relied upon as making the contract upon which petitioners claim the right to sue as undisclosed principals.

Now the question presents itself—why is it, that through all these combinations the identity of Clews & Co.'s sales has been preserved, even when the amount of stock deliverable was less than their 700 shares, and so

that they became parties to the last substituted contract? And what has become of the rights, and what is the situation, of the other customers of Schwartz, Dupee & Co., *for whom more stock was sold by them than was sold for Clews & Co.?* Is there any theory suggested which can give Clews & Co. the right to claim this substituted contract as theirs, eliminating and disregarding the rights of the others, for whom, after the contract of Clews & Co. had been made and put into the clearing-house, new sales were made for more than 700 shares?

The total sales made by Schwartz, Dupee & Co. after July 27th (even eliminating the 150 shares sold that day in connection with the 200 shares of Clews & Co.) amount to 950 shares. If the substituted contract of August 3d, the resultant, as it is said, of all of these transactions, called for the delivery of enough shares to fulfill the contract of Clews & Co. and the other customers for whom Schwartz, Dupee & Co. made sales, there would be more plausibility in the contention that the identity of the transactions was in some way preserved; but such is not the case. These other customers had contracts for delivery of 950 shares, and it would take a contract for 1,650 shares to satisfy their sales and those of Clews & Co. The rights and obligations of these parties cannot be disregarded. Jamieson & Co. were under just as plain a liability to them, as contracting parties in this substituted contract, as to Clews & Co.

What can be said, too, of the rights and liabilities of the persons for whom on July 29th Schwartz, Dupee & Co. bought 300 shares? Have their contracts entirely gone out of existence, or have those parties some interest in this final substitution? It is plain that if the mere fact that a sale for one customer is a factor in the produc-

tion of the last substituted contract, makes that customer a party to such contract, the influence of a buyer is just as great as that of a seller.

All this "confusion worse confounded" is avoided by regarding the adjustments through the clearing-house as being mere adjustments so far as the brokers are concerned, leaving the contracts of their principals as they were originally made. And from this chaotic mass of confusion we must turn with a certain sense of relief to the agreed statement of facts in this case, in which all parties to the litigation agree and say that the transactions on behalf of the principals, "so far as the different principals are concerned, were not settled or cancelled by any of the substitutions, nor by any of the settlements between the brokers. * * * In other words, the settlements by substitutions or otherwise through the clearing-house, were merely settlements between the members of the stock exchange, and were not settlements or cancellations of contracts between the principals whom the brokers represented and the brokers themselves." (*Trans., p.* 78.)

The preservation of the identity and the integrity of the original contracts made by the principals through the brokers is plainly inconsistent with the existence of a subsequent contract to which those principals were parties. It would be a misuse of terms to say that these subsequent contracts were substituted for original contracts which still remained in force; and it would be a patent absurdity to say that Clews & Co. were still liable upon, or entitled to enforce, the two original contracts for 500 and 200 shares, made by them on July 25th and 27th, and were also liable upon or entitled to enforce another

contract for a greater number of shares, at a different price.

Further than this, the case happens to show another concrete illustration of the effect of the admitted preservation of the original contracts. In selling the 500 shares on July 25th, Schwartz, Dupee & Co. sold 50 shares to Jamieson & Co. at $229. There thus arose, upon the theory of undisclosed agency, a contract between Clews & Co. and Jamieson & Co., for the sale and purchase of 50 shares at $229. If no subsequent transaction had been had, that contract would, as counsel will admit, have gone to its maturity and could have been enforced by and against Clews & Co. and Jamieson & Co. It is admitted by the agreed statement of facts that the contract thus made still existed, and was not cancelled or discharged by the subsequent clearing-house operations. We have then, a contract for a sale of 50 shares from Clews & Co. to Jamieson & Co., and at the same time, as it is claimed, a contract with them for a sale of 1,150 shares, of which 700 belonged to the petitioners. From this there is no escape.

It is unnecessary for the decision of this case to determine just what the result is, between the broker and his own principal, of the cancellations and substitutions through the clearing house by which the brokers make new contracts as between themselves. For if the principals do not become parties to these new contracts, then this suit cannot be maintained, and the dismissal of the bill was inevitable. The question whether the principals become parties to the new contracts is by no means dependent upon the effect of the new contract as between the broker and his principal. But the result as between the principal and the broker seems to work out logically

and necessarily to what is admitted in the agreed statement of facts. The broker, having used his principal's contract for his own benefit, is bound to see that his principal gets whatever would have resulted from the contract. A principal who has bought or sold is entitled to performance of his contract and to the benefit of his bargain. If the broker has bought 100 shares and by an offset of a sale for an equal or greater number he comes out of the clearing house discharged from the obligation of receiving it, the substantial result is that he assumes the obligation to deliver it to his principal, for the latter's right to receive it still exists. Doubtless the broker would in most instances make the delivery with the stock received from a customer for whom he had made a sale, or delivered to him by another broker, or settle the difference in money where that sort of speculation was the purpose of the parties. But the source from which he would get the stock or fund to perform his obligation to the principal does not affect the existence of the obligation.

The agreed statement of facts says that the original contract made for the principal is, as between him and his broker—as well as between him and the opposite broker and principal, unaffected by the clearing house transactions. And in that part of their brief where they treat of the question of gambling, counsel state that the "daily novations and substitutions" do not absolve the parties from the obligation to deliver or receive the number of shares contracted for at the time specified. And their argument is that the operations of the clearing house have furnished the broker with the means, in money and contracts of doing this. Is not this but another way of saying that the principal receives performance of the contract from his broker? If the principal has sold, he de-

livers the stock to his broker on the account day and receives the contract price, which the latter has already received from a buying client, and through the daily money settlements in the clearing house. And on the other hand, if he is a buyer, he receives the stock from his broker, and pays him the price.

Much space is spent by counsel for petitioners in showing that the difference between the contract price in the original sale and the constantly changing price in the substituted contract is "equated" by the daily payments of money through the clearing house; and they say that this is contemplated and intended by the parties in entering into the original contract. In other words, that the parties intend to settle by the payment of money differences. But even if this is so, it does not make the principal a party to each new substituted contract. For these cancellations and substitutions change not only the price, but the number of shares; and the result is as likely to be a cancellation of the brokers' obligation to deliver or receive as a new contract to buy or sell. The principal is either a *party* to, and bound by, the result reached each day by the clearing house operations, or he is not a party to any of them. And not only is this so, but *each* of the principals in the contracts which go to make up the substituted contract is a party to it, *even if as in this case that contract does not call for enough shares to satisfy his contract.*

The conclusion is forced upon us that, as counsel use the word, and describe the transaction, "equating" is but a euphemism for "settlement by payment of differences." Thus we are contending for a construction of their clients' contract which would make it legal on its face, and they for a construction which imputes an intention to "equate"

the contract by paying or receiving the difference between the market and the contract price.

It is, however, contended by opposing counsel that the rules of the Exchange with reference to account trading provide for just this kind of necromantic transformation; and that customers dealing on the exchange contract with reference to the contingencies which the operations of those rules may create. They contend that an order to buy or sell for the account gives a sort of roving commission to the broker, after making the contract in accordance with his instructions, to substitute for it any sort of contract which his purchases and sales on behalf of himself and other customers may render necessary or expedient. And to this new contract, they argue, no matter how much the process of evolution or revolution may have changed it from its original *species,* the principal has, in advance, authorized his agent to bind him. No one claims that there is any evidence that Clews & Co. *actually* gave any such instructions, or *actually* knew of the rules and practice of the Stock Exchange, to which reference is made. The proposition is concededly based upon a presumed knowledge from the mere fact that they directed a sale "for the account."

In support of this counsel quote the following statement of the well-known rule from the decision of this court in *Bibb* v. *Allen,* 149 U. S., 481:

> "It is settled by the weight of authority that where a principal sends an order to a broker engaged in an established market or trade, for a deal in that trade, he confers authority upon the broker to deal according to any well-established usage in such market or trade, especially when such usage is known to the principal, and is fair in itself, and does not change in any essential particular the contract between the

> principal and agent, or involves no departure from the instructions of the principal; provided, the transaction for which the broker is employed is legal in its character, and does not violate any rule of law, good morals or public policy."[1]

The rule thus stated, it will be noted, is, that authority is given to deal according to an established usage, *which does not change in any essential particular the contract between the principal and agent, and involves no departure from the instructions of the principal.* If this qualification is not one which applies to a case in which a contract to sell 100 shares at one price is transformed into a contract to sell 200 shares at a lower price, or perhaps transformed into a *purchase* of a still different number of shares, we are at a loss to understand what case the court could have had in mind to which the qualification would apply. Under such circumstances an essential change in the contract is effected, and an essential departure from the instructions of the principal is made. And it is only by what amounts to almost an abdication of reason that we can presume an intention on the part of a customer, to allow himself to be bound by contracts so constantly shifting and so widely varying in their changes from the actual contract which he contemplates and orders.

This is well stated by the circuit judge in his opinion, although he regarded it as necessary for the purposes of his decision, to speak only of the presumed authority to change the contract price. On this question he says:

> "The only question is, whether the complainants were parties principal to the contract between Schwartz, Dupee & Co. and defendants. The evidence discloses that their authority to the brokers was to sell 700 shares of this stock at 229; and while

the authority to sell for more than this might be implied; authority to sell for less could certainly not be. They were entitled under their contract with Schwartz, Dupee & Co. to a purchaser at 229 or more. They were bound to no sale at a figure less. Neither Schwartz, Dupee & Co., nor any persons with whom that firm had contracted, could have compelled the complainants to deliver the stock at a price less than 229; but the contract between Schwartz, Dupee & Co. and the defendants was for the sale of 700 shares at 222. Under the contract between the brokers the defendants could have demanded a conveyance at 222. But of whom could they have made such demand? Certainly not from the complainants; their contract was for 229 and no less. The devices of the exchange for clearing and counter-balancing accounts between the brokers could not without their consent change so essential a term of the complainants' sale. It cannot be that authority from a principle to sell at 229 can, without his conscious assent, be transformed into an authority to sell at 222. The original understanding that the sale should be made under the rules and practice of the Stock Exchange, cannot be interpreted to give such elasticity to the all important feature of price. Who would deal on the Exchange, as principal, if it were understood that the prices named had no fixity, that the obligation might be one thing to-day and another totally different thing to-morrow? While the substitutions, resulting in prices unquestionably different from those originally authorized, bind the brokers participating, they do not, in the absence of assent, reach over so as to change the contract rights of the principal. To hold otherwise would be to abolish by judicial pronouncement the authority, on the faith and stability of which every transaction on the Exchange is grounded." (*Trans.*, 82-2.)

In the case of *Bibb* v. *Allen*, upon which opposing counsel rely, the rules of the Exchange did not involve any of the material changes in the contract of the principal

which this case shows. And in addition to this the brokers there did not rely upon a mere presumption of knowledge on the part of the principal that the contract would be regulated and affected by the rules of the Exchange; for actual notice to them of that fact was shown. And this is stated by the court in saying that the rules formed a part of the contract. We quote from that part of the opinion:

> "These rules, which were authorized to be made by the statute of the State of New York, under which the Exchange was incorporated, enter into and form a part of the contracts of sale in this case. The defendants (the brokers) in one of their earliest communications to the plaintiffs, informed them that they would use in their telegraphic correspondence what was known as Shepperson's code, which provided that, *"unless otherwise stated as agreed it is distinctly understood that orders sent by this chapter are to be subject in every respect to the by-laws and rules of the market where executed,"* and further that, *"with every telegram sent by this table the following sentence will be read as a part of the message, viz: this sale has been made subject to all the by-laws and rules of our Cotton Exchange in reference to contracts for the future delivery of cotton."*

In the case at bar the contention that Clews & Co. were bound by these rules of the Exchange, which, it is said, could work such a strange transformation in their contract, is based solely upon presumption. There is no evidence that they had actual knowledge of the rules—to say nothing of knowledge of the results which are now claimed to flow from the clearing-house transactions. There is no evidence that they ever heard of any of the substituted contracts which were made before August 3rd, *nor that they ever heard of that contract until after Jamieson & Co. had refused to receive the stock.* Their

names were not so much as mentioned until September 9th, and then only in a letter from Schwartz, Dupee & Co. to Jamieson & Co., stating that on August 31st Schwartz, Dupee & Co. had tendered Jamieson & Co. 700 shares (*which was not true, as the tender was of 1,150 shares*) and that the sales were on behalf of Clews & Co. (*Trans., p.* 40.) On the next day the attorneys of Clews & Co. gave notice that the stock would be sold on September 15th. This is the first act by Clews & Co., and to call it their act we are to presume authority to the attorneys to perform it. But what is the basis of a presumption as to *when* this authority was given? So far as the evidence shows there was no communication between Schwartz, Dupee & Co., or the attorneys, and Clews & Co. until after August 31st. The probability is that there was none: for certainly there was no occasion for it until Schwartz, Dupee & Co. knew that the stock would not be accepted. But the burden of showing a fact peculiarly within their own knowledge and upon which their rights depend is certainly upon the complainants in a case.

The only fact upon which reliance is placed either by counsel for the Stock Exchange or counsel for the petitioners, as showing that Clews & Co. were bound, not only by the rules of the Stock Exchange which regulated the performance of their contract, but by rules which are said to authorize its complete transformation, is the fact that in their telegraphic orders they directed sales "for the account." The argument is, that this use of the word "account" has a special meaning, which carries with it by implication authority to make all these changes.

It will be observed that in the rules no definition is given of the expression "for the account," except such as is implied from the provision that deliveries and sales

"for the account" shall be made on the last day of each month. Mr. Wilkins, as a witness for the complainants, testified to the meaning of this phrase as follows:

Q. What do you mean by the account?

A. It means 500 shares of stock which is to be delivered and paid for and taken at the end of July. The delivery day for July is the last day of the month, or for any account is the last day of the month.

Q. Then the technical meaning of the word account is future delivery, in effect?

A. Yes, sir.

Q. I mean for the same month?

A. Yes, sir; for the month in which it is sold.

Q. So that the word account really means the account day of that month?

A. Yes, sir. (*Trans., p.* 110.)

The witness then explains the use of the words "first account" as referring to the current month, and "second account" as referring to the succeeding month; this does not, however, in any way change the definition which he gives.

If we could indulge in presumptions in favor of the complainants, who have the burden of proof, it cannot with fairness be said that they can, by presumption, be credited with having a different knowledge of the meaning of the word "account" than is thus given by the manager of the clearing-house. As he describes it, it is a phrase referring to the time of delivery.

Mere presumption, however, cannot be made the basis of binding Clews & Co. to a practice which would work such a radical change in the contract into which they designed to enter. This is decided in the case of *Irwin* v.

Williar, 110 U. S., 499. In that case reliance was placed by the broker on the binding effect upon his customer of the practice of the Baltimore Board of Trade with reference to purchases and sales for future delivery. The custom there relied upon was quite similar to the theory of substitutions which underlies the petitioners' claim in this case. It was the practice there for commission merchants, as between themselves, to set off one contract against another, settling between them the difference in price, and each substituting on his books some new customer. This was done not only where the broker had bought and sold for different customers, but where the transactions of a number of brokers were settled by "ringing up." How similar this custom was to the description given in the petitioners' brief is shown in the following quotation:

> "In such case all margins put up by the commission merchants are restored, contracts surrendered, and the contracts or orders of their undisclosed principals, upon whose instructions they had entered into those contracts, are held in lieu of the contracts so surrendered, each commission merchant being responsible to each of his customers for performance by the others.
>
> "The settlements of differences made by defendants in error on account of Davis & Irwin were made in pursuance of these customs, but there was no evidence that Davis & Irwin had any knowlege of it."

In holding that there could be no presumed intention on the part of the customer to be bound by this practice on the Exchange, in the absence of actual knowledge of such practice, Mr. Justice MATTHEWS said:

> "The relation between the parties to this litigation was that of principal and agent; and the defendants in error, acting as brokers, in executing the orders to sell, undertook to obtain, and, as they allege in their

declaration, did obtain a responsible purchaser; so that the plaintiff in error would upon the contract of sale against such purchaser, when disclosed, have been entitled to maintain an action in case of default in his own name. Although the broker guaranteed the sale, it was not a sale to himself, for, being agent to sell, he could not make himself the purchaser. The precise effect, therefore, of the custom proved was, that at the time of settlement, in anticipation of the maturity of the contracts, the brokers, by an arrangement among themselves, by a process of mutual cancellation, reduced the settlement to a payment of differences, exchanging contracts, so as to substitute new purchasers and new sellers, respectively, for the balances. The question is not whether in a given case, without the assent, express or implied, of the principal, this change of his rights and obligations can be effected (for that proposition is not doubtful), but whether the fact of his transacting business through a member of the Exchange, without other knowledge of the custom, makes it a part of his contract with the broker."

The justice then examines a number of English cases on the subject, relating to the customs of the London Stock Exchange (upon which such great reliance is placed by opposing counsel). He quotes with approval the statement of Lord Chelmsford, that the customer—even if unacquainted with the usages upon the market—gives authority to his broker to make contracts on the footing of such usages, provided "*they are such as regulate the mode of performing the contracts, and do not change their intrinsic character.*" And, quoting further, that such a custom, "if allowed to prevail, would work a change in the relation between the broker and his principal, by permitting the agent to buy, to convert himself into a principal to sell." Mr. Justice MATTHEWS then concludes:

"This exchange and substitution, and payment of

differences to effect it, *working, as it does, a complete change in the nature of the seller's rights and obligations, cannot be made without his assent; and that assent can be implied only from knowledge of the custom which itself authorized it.* The Circuit Court, therefore, erred in permitting proof of this custom, without evidence that the defendant below had knowledge of it, and in not instructing the jury to disregard it, if they were satisfied from the evidence that such knowledge had not been satisfactorily shown."

It is a clear proposition that no contract arose between Jamieson & Co. and Clews & Co., unless the latter were bound equally with the former the moment the contract was made. The mutuality of obligations is an essential element of a contract. It is, therefore, of no consequence that Jamieson & Co. knew the rules: for unless Clews & Co. were bound to them, they were not bound to Clews & Co. Under the decision in *Irwin* v. *Williar,* Clews & Co. could not have been held liable by Jamieson & Co. upon the substituted contract; for there is an utter absence of any knowledge on their part of the practice upon which that contract was founded, and nothing from which assent to that contract could be inferred. Stating that they were not bound to Jamieson & Co. is but another way of saying that the latter were not bound to them.

But here again, upon this question of assent by Clews & Co. to this practice of substituted contracts, we have only to take the rule of law as the petitioners state it, and the agreed statement of facts, to destroy the theory of their argument. For their statement is that the parties contract with reference to the rules of the Exchange, and the principals give authority to their brokers to accomplish the results which those rules render possible. By the agreed statement of facts it is conceded that these set-

tlements and substitutions through the clearing-house did not settle or cancel the original transaction, so far as the rights of the principals were concerned, but were only settlements between the members of the Stock Exchange, leaving the contracts between the principals represented by the brokers and the contracting brokers unimpaired.

The case, therefore, is concededly brought exactly within the decision of Judge Grosscup, that the new transactions bind the brokers, but "do not reach over so as to change the contract rights of the principals." If, as all parties thus agree, the rules of the Stock Exchange do not contemplate a change in the contract, or the contract rights, of the principal under his original agreement, but merely arrange a settlement between the brokers themselves, affecting only their rights, upon what possible theory can it be contended that a simple order to buy or sell has attached to it an authority exactly contrary to the admitted meaning and effect of these rules of the Exchange?

The case of *Higgins* v. *McCrea,* 116 U. S., 671, has in it some features similar to those of this case. That was an action between a broker on the Chicago Board of Trade and his principal, and it involved the effect of a practice on that Exchange, by which the broker was allowed—after having made a contract of sale, to substitute another purchaser in place of the original one. In that case the broker, through the operations of the clearing-house of the Exchange, settled and discharged the original parties to the contract, but did not actually make a new contract with another person, who was thus substituted as a buyer in place of the original party. The court held that this was not a compliance with the rule. We quote from the opinion:

"After the contracts made by them (the brokers) for the day had been offset against others and thereby cancelled, no other contracts were substituted in their place which the defendant could have enforced. In fact, there was no substitution—no contracts were designated to take the place of those so cancelled. All that the plaintiffs say on this point is that it was their purpose to apply the first purchase delivered in August on contracts of sale first to the oldest contract of purchase, and it was uncertain on what contract the first delivery would be made until the delivery actually took place. If there was any substitution of other contracts for the cancelled ones, it was only in the mental operations of the plaintiffs, to which no outward expression whatever was given. The plaintiffs admit in their evidence that after the original contract made with the defendant was offset and released, they alone were bound to the defendant, and that there was no other person against whom the defendant could have maintained an action."

If it were conceded that the original contracts made by the principals were cancelled by the substitutions, it would still be plain that no new contract was thus actually substituted in the place of the original agreement. Take, for instance, the sale, on July 27th, of the 200 shares; this was, it is said, a part of the 350 shares sold to Peters on that day; but that trade was immediately canceled by purchasing the same number of shares at the same price from Peters, and the substitutions in the clearing-house, as the result of that day's transactions, were of only the 500 shares coming over from the day before. Thus, in cancelling that order, Schwartz, Dupee & Co. not only did not substitute any contract upon which Clews & Co. could have held the hypothetical new buyer liable, but their outstanding sales were actually less than the amount called for by the two orders which they had executed for

the petitioners. As was said in *Higgins* v. *McCrea, supra,* "No contracts were designated to take the place of those cancelled."

Where a similar practice on the Cotton Exchange was involved it was said:

> "It was necessary that the plaintiffs (the brokers) should have had contracts for the delivery of cotton of the same quality, at the same price, and at the same time provided in the original contracts of purchase, contracts corresponding in all respects with the original contracts had they remained uncancelled and in force; in other words, contracts to be substituted for the original contracts."
>
> *Lehman* v. *Field,* 37 Fed. Rep., 852.

It is asserted by opposing counsel that Clews & Co. became parties to this substituted contract by ratification. This contention is obviously inconsistent with the theory of a prior authority—and upon the theory of a prior authority, and the several consequences which would flow from the existence of such authority, the case as a whole must rest. If such prior authority existed, there was neither necessity for ratification, nor should we expect to find any subsequent act in the way of confirmation of an agreement by which the parties already understood they were bound.

There is an utter absence of anything in the nature of confirmation by Clews & Co. of this contract. We have pointed out that not only was there no knowledge on their part of the custom by which their contracts could be so materially altered, but no knowledge on their part that such alteration had taken place. There was no knowledge on their part of the tender of 1150 shares on August 31st, nor of the fact that only by a tender of that number

of shares could compliance be made with this new contract to which it is said they were parties.

When tender of performance was thus made, Jamieson & Co. declined to accept the stock. And it is clear from the evidence that on that day nothing had been done by Clews & Co. which would have bound them to the contract, if it was not originally obligatory upon them. So far as any act on their part is concerned nothing was done until their attorney gave notice of the sale of the 700 shares of stock. It must be a clear proposition that they could not, by even the most express ratification, at that time, have increased the liability of Jamieson & Co., or imposed upon them a liability which did not exist when they refused the tender of the stock on August 31st.

We do not think counsel will contend that if this stock had gone to $250, which would have made a great profit to Jamieson & Co., and consequent loss to Clews & Co., a recovery could have been had against the latter, with no more evidence of either original authority or subsequent ratification of the contract than is shown in this record. Unless the contract could have been enforced by Jamieson & Co. under such circumstances, by suit in their own name, it cannot be enforced against them.

The English cases from which such liberal quotation is made in the brief of opposing counsel relate, mainly, so far as applicable to this case, to the question whether a contract arose between Schwartz, Dupee & Co. and Jamieson & Co., through the machinery of the clearing-house. They do not involve the question whether a substituted contract made by a broker with another, for a different number of shares than that which his client directed him to sell, creates a contract between the latter

and either the broker or the undisclosed principal on the other side.

In *Maxted* v. *Paine*, 6 L. R. Ex., 132, the plaintiff had, through his brokers, sold to A, a member of the London Exchange, ten shares in a company. On the delivery or "name day," A passed to plaintiff's brokers a ticket containing the name of G as the ultimate purchaser, and *he was accepted by the plaintiff as such and the stock transferred to him.* G had in fact been employed by still another principal to act as purchaser, for a consideration, *but this was not known to the defendants.* A was afterwards compelled to pay assessments on the stock, and sued the defendants to recover them. It certainly would seem that on these facts much that was said as to the purpose or effect of transactions on the Stock Exchange was unnecessary to the decision. The purchasing broker disclosed his principal at the time when the rules of the Exchange required, and that principal *was accepted by the plaintiff as the contracting party.* This of itself would, to put it very mildly, go far towards discharging the broker; for the seller, when the principal was disclosed, had a right of election and could not hold both principal and agent. But the seller did more than this, he transferred the stock to the man whom he accepted as principal, thus *executing* the contract with him. The agent was thus completely discharged; and the liability which the plaintiff sought to enforce against him was not upon the contract made in his name, but for a *subsequent* failure of his principal to pay assessments on the shares. The obligation to pay those assessments was not upon the defendant, for the stock was not transferred to him but to his principal. It was an obligation which attached to the ownership of the stock, and the principal was lia-

ble for it because the stock was transferred to him. This was plainly sufficient to discharge the broker for liabilities based upon a subsequent default of his principal, and upon facts of which he was ignorant when he made the contract.

The question involved in this case, however, is decided in the most recent English case upon the subject, and exactly sustains the view for which we contend. This is the case of *Beckhuson* v. *Hamblet,* 2 L. R., Queen's Bench Division, 18. The facts in that case were as follows:

The defendant, having through his brokers purchased 210 shares for the "first account," directed his brokers to carry them over to the "second account," which would expire on December 29th. The brokers, having orders from other clients for purchases of the same stock, bought by single contract in their own name 360 shares from the plaintiffs, who were jobbers on the Stock Exchange. They apportioned on their books 210 of these shares to the defendant, their principal in the transaction. Before the settling day the brokers who made this purchase failed, and their transactions were closed out on the Stock Exchange in accordance with the rules.

The plaintiffs, from whom they had purchased the 360 shares, having ascertained that the brokers were acting for the defendant in regard to 210 of those shares, tendered that number to him, and on his refusal to take them, sold them on the settling day, in accordance with the rules of the Exchange, and sued him for the difference between the contract price and the selling price.

It will thus be seen that the case presented exactly the question which is here involved, and that the facts

were far stronger in favor of the liability than can be claimed in this case. For there no question of substituted contracts was involved, and the purchase covered a greater number of shares than the defendant had directed the brokers to buy, only because the latter had included in one contract in their own name the orders of several customers. It was upon that direct contract that the suit was based. The case would, therefore, be exactly similar if there had been here no substitutions or cancellations, and if Clews & Co. were suing as to 200 of the 350 shares which Schwartz, Dupee & Co. included in one single sale to Peters on July 27th. Or, if Schwartz, Dupee & Co. had received an order from Clews & Co. to sell 700 shares and had included it in one entire sale of 1,150 to Jamieson & Co.

It was held that as the brokers included the defendant's order with that of other clients, and had contracted in a single transaction with the plaintiff for the purchase of a larger number of shares than the defendant had authorized them to purchase for him, no contractual relation existed between the plaintiffs and defendant, and the action could not be maintained. Mr. Justice Kennedy in delivering the opinion of the court comments at length upon the Stock Exchange methods, and says that the settlements effected between brokers under the rules of the Exchange are what may properly be termed *domestic settlements,* not intended to affect outsiders.

He then states that the question of the right of action depends upon whether the transaction created privity of contract between the plaintiffs and the defendant, as an undisclosed principal, and that if the contract between the plaintiffs and the defendant's brokers was one, by "virtue of which the plaintiffs, as the sellers, and the defendant,

as the principal of the buying broker, came under an enforcible liability as to each other in respect to its performance," then there might be a recovery. He then continues:

"It appears to me to be clear in regard to these Stock Exchange proceedings, that, to borrow the language of James L. J., in *ex parte Grant, in re Plumbly* (13 Ch. Div., 667), 'whatever the liabilities and the rights of the outside world may be, they remain unaffected.' But the failure of these contentions on behalf of the defendant leaves standing, as it seems to me, that which, according to my view of the case, is a real and fatal obstacle to the plaintiff's success in this action. It appears to me that no contractual liability of the defendant to the plaintiffs ever existed in respect to this transaction. The defendant's authority to the broker was to 'carry over'—in substance and effect to buy for him for the end of December account—210 Louisville shares. What the broker did was to buy in his own name from the plaintiffs for that account 360 Louisville shares. He did that which is, I believe, a common thing, and often no doubt from the business point of view a very convenient thing. He lumped, if I may use the word, the orders of two clients in one contract of purchase in his own name. In so doing he acted, I doubt not, in perfect good faith, allocating in his books a proper proportion of the total number of shares contracted for to the two clients, respectively; *but it appears to me that the contract so made was his contract and not a contract of either of his clients.* A very similar course had been taken by the broker, the plaintiff in the action, upon the London tallow market, in *Mollett* v. *Robinson* (L. R. 5, C. P. 646, 7 H. L., 802.) The defendant there was in a position analagous to that of the defendant here, and Simpson & Co. in a position analagous to that of the plaintiff here. Blackburn, J., in his judgment in the Exchequer Chamber points out the necessary result: 'The defendant could not call upon Simpson & Co. to deliver him 50

tons of tallow under the contract of the 2nd of April, because Simpson & Co. had not engaged to deliver any smaller quantity than 150 tons. Nor could Simpson & Co., if willing to deliver the smaller quantity of 50 tons, compel the defendant to accept them, because, if they had been unwilling sellers, the defendant could not have forced them to deliver that smaller quantity. And I cannot think that the difficulty is cured by any equity entitling the now defendant to use the plaintiff's name and sue upon the contract *pro tanto* for himself."

The judge then quotes from the opinion in the same case in the House of Lords, the statement that the difference between the quantity called for by the contract and the orders of the defendant "prevented them from being contracts with the defendant." Taking up, then, the usages of the Stock Exchange, he says:

"There is no usage of business on the Stock Exchange which can, as the plaintiff's counsel seemed to suggest, avail to help the plaintiffs through this difficulty. There is a usage, no doubt, that the stock broker contracts in his own name. It by no means follows from this that he should lump the orders of several clients, and buy, not what a particular client has authorized, but a different and larger quantity. But let it be assumed that the usage exists in its most ample form. Let it be assumed that there is a usage on the Stock Exchange, legally valid and known to and binding upon a client such as the defendant, that a stock broker employed in the purchase of shares for a client properly may, if he thinks it convenient, fulfill his duty to his client, although, instead of creating, as it is ordinarily a broker's duty to create, a contractual relation between his client and the seller he lumps the client's orders with other orders and in his own name contracts in a single transaction with the selling jobber for the purchase of a larger number of shares than the client has instructed him or authorized him to buy. What follows from this assumption? This only,

as it appears to me: that; as the broker will have fulfilled his duty according to usage, the client cannot complain, and is bound to pay the broker his commission and indemnify him against such liabilities as the broker may necessarily or properly incur in the course and for the purpose of his employment. Surely, the usage in no way assists the plaintiffs' case here. The plaintiffs' case is not a case of a broker suing his client for indemnity in respect of shares bought for the client in a way which is sanctioned by the rules and usages of the Stock Exchange, *but it is the case of a seller seeking to have recourse against the principal of a broker who has contracted with the seller in his own name by a contract for the purchase of a larger number of shares than that which the client authorized, and which included a number which were being obtained by the broker for a different client. The usage cannot operate, in my judgment, so as to make a man liable upon a contract which is not, in point of law, his contract; it cannot create contractual rights between parties where none exist according to legal principle.* Indeed, the very meaning of the usage may, as it seems to me, be stated in language used by BLACKBURN, J., in his judgment in *Mollett* v. *Robinson*, in regard to the custom which was under discussion in that case—it is *'not to require the broker to take care that privity of contract is established between the broker's client and the person who makes the contract with the broker into which he enters in consequence of his client's order.'* In my opinion no such contractual relation has existed between the plaintiffs and the defendant as is necessary to support this action, and therefore, I must give judgment for the defendant."

Applying that case to the one at bar, we have this result: If, eliminating all questions of substituted contracts, Schwartz, Dupee & Co. had received an order from Clews & Co. for the sale of 700 shares, and had filled it by making a contract of sale on August 3rd for 1,150

shares with Jamieson & Co.,—which is what the bill alleges—and Clews & Co., upon discovering the fact had tendered to Jamieson & Co. 700 shares on August 31st, and on their refusal to accept had sold the stock in accordance with the rules of the Exchange (instead of making a fictitious sale), they could not have maintained an action to recover the difference, because there was no contractional relation between them and Jamieson & Co.

We have, with what we fear may perhaps be unnecessary repetition, called the court's attention, in connection with different branches of the case, to the admitted fact that the original transactions made by the brokers on behalf of the petitioners remained in full force, notwithstanding the settlements and substitutions between the brokers themselves; and as a conclusion of this branch of our argument, we present the sharp contrast between the statement in the brief of counsel for petitioners, and the agreed statement of facts. In their brief counsel say, in summing up the effect of these transactions:

(Brief, p. 222.)

"When the contract of July 25th at 229 per share, through these daily novations and substitutions, had merged into the contract of August 3d at 222 per share, *all prior contracts had been cancelled and annulled.*"

(Trans., p. 78.)

"Those transactions, so far as the different principals are concerned, were not settled or cancelled by any of the substitutions, nor by any of the settlements between the brokers, except so far as where one client or principal of a broker, was through such broker both a purchaser and a seller.

In other words, the settlements by substitutions or otherwise through the clearing house, were merely settlements between the members of the stock exchange, and were not settlements or cancellations of the contracts between the principals whom the brokers represented and the brokers themselves, except where the same broker had both purchased and sold for the same client."

These admitted facts give added point to all that is said in *Beckhuson* v. *Hamblet, supra;* for here the original sale for 500 shares which the brokers *were* authorized to make continued in force as to the petitioners; and certainly the proposition that their liability could be affected by a contract which they had not authorized is lightly characterized as untenable.

II.

THE SALE MADE BY THE PETITIONERS WHILE THE STOCK EXCHANGE WAS CLOSED, FOR THE PURPOSE OF FIXING THE AMOUNT OF THEIR DAMAGES, WAS BOTH A VIOLATION OF THE RULES OF THE EXCHANGE AND AN ACT OF SUBSTANTIAL BAD FAITH TOWARD THE DEFENDANTS, EVEN IF A CONTRACT EXISTED BETWEEN THEM AND THE PETITIONERS.

We have called attention in the statement of the case to the rules of the Stock Exchange, which provide a method for closing out defaulted contracts, and for the ascertainment, by a sale, of the amount of damages resulting therefrom. It is conceded that the method provided by those rules was not followed, and, therefore, if those rules are obligatory as part of the contract upon which this suit is based, no right of recovery has been shown, even conceding that the transactions disclosed by the evidence created a contract in which Clews & Co. were sellers and Jamieson & Co. were purchasers.

With due respect to opposing counsel, we do not think they have apprehended our position on this branch of the case. These provisions of the rules in no respect resemble provisions sometimes inserted in contracts, the purpose of which is to erect a new tribunal and oust courts of their jurisdiction to entertain suits for the enforcement of the

contract, or the recovery of damages for its breach. They only provide what it is clearly competent for the parties to do—a method of ascertaining the damage occasioned by a default, by providing that certain things shall be done in such cases. It is plainly within the power of the parties to provide that in case the buyer does not receive the stock, the seller shall be obliged to do certain things, and to state definitely what he shall do in the way of ascertaining the market price, which would fix the extent of the buyer's liability. We therefore deem it entirely unnecessary to consider the rules of law discussed by opposing counsel as to the effect of contracts to submit disputed matters to arbitration or to oust courts of their ordinary jurisdiction.

It is practically conceded, and we suppose will be expressly so—that if the Stock Exchange had not closed, Clews & Co. could not have held Jamieson & Co. liable for the difference between the contract price and the price obtained by a sale not made in accordance with the rules of the Exchange. The question arises because of the fact that the Stock Exchange was temporarily closed.

The theory upon which this case is prosecuted necessarily admits that these rules form a part of the contract between the parties. Indeed, these rules would form a part of that contract and be binding upon Clews & Co. within the principles of the decisions to which we have referred, even if a practice such as petitioners rely upon would not bind them to a substituted contract, differing essentially from the terms of the one which they authorized, for these rules do not involve any change in the essential elements of the contract, but regulate only the method of procedure under it.

No question is raised as to the power of the governing committee to close the Stock Exchange. The reason for closing the Exchange was because of a great financial crisis, which so disturbed the ordinary conditions of the market that, if the Exchange had remained open, very serious catastrophe would have resulted, involving the ruin of many of its members. The governing committee therefore closed it, and the very purpose of that act was to prevent such sales as the one attempted to be made by the petitioners in this case, and to prevent the closing out of August contracts during a period of panic, and to allow the market to recover as far as possible its normal condition.

Applying the principle upon which petitioners rely, that parties contract with reference to the action of the Stock Exchange, it seems quite clear that they contracted with reference to the contingency of this power of temporarily closing the Exchange being exercised by the governing committee, and thus of having their rights to close out defaulted contracts by re-sale of the stock temporarily suspended. The rule on this subject provides that where a buyer (for instance) defaults on his contract, the seller shall, after giving notice, employ an officer of the board to close the contract in the Exchange by a sale, unless the price has been agreed upon by the contracting parties. If the seller does not exercise this right, then the rule provides that the price shall be fixed by the price current at the time that contract ought to have been closed under the rule.

Clews & Co. thus had two options—either to request an officer of the Board to make a sale, or to settle the contract upon the price current. It is an admitted fact that they did not request any officer of the Exchange to

make such a sale. Their excuse for this probably is that the Exchange was closed, but the duty of taking the first step was upon them. The officer would have no right to make the sale until he had been requested in writing to do so, even had the Exchange been open. As no definite time was fixed in the order of the governing committee for the closing of the Exchange, what would have happened had they made such a request of the proper officer is problematical. Certainly there is no reason for their utter failure to take that first essential step of requesting the officer to make the sale, merely because the Exchange was not open on August 31st. It is much more natural to presume that if such a request had been made, and the officers had thus seen that an important transaction required such action, arrangements might have been made for taking it.

But under the rule Clews & Co. were not *bound* to have the damages on the contract fixed by a sale made in this manner. Therefore, we can only conjecture whether, had the Exchange never been closed, they would have availed themselves of this privilege or not. They had the alternative of taking such affirmative action, or of submitting to the operation of the next clause of the rule, which provides that if they do not do so the price shall be fixed by the price current at the time the contract should have been closed under the rule. Whether their failure to take advantage of the first alternative was due to a good or bad reason, the fact remains the same, and would seem to bring into operation the second part of the rule.

The question arises, what is meant by the price current? It would seem to mean, and being a definite rule of the Stock Exchange clearly to refer to, the price current as fixed by sales on the Stock Exchange, or perhaps to the

daily settlement price fixed by the manager of the clearing house in accordance with its rules. The only other meaning that can be given to the phrase would be that it referred to the general market price. Whichever meaning is attached to it, it is the price current on the day when the contract ought to have been closed under the rule, which probably is an equivalent expression in this transaction for the day on which delivery should be made. How are we to determine what was the price current on the Exchange at that time? Counsel for petitioners assume that there was no price current, because the Exchange was closed. This assumption seems to us to have no reasonable basis. There obviously was a price current on August 3d, both as fixed by actual transactions and by the settlement price, and that price current is shown by the evidence in this case to have been $222 a share. Certainly, it is as reasonable to regard this as the price current on the Exchange—it being the last price settled before the delivery day—as to assume that there was no price current whatever. All presumptions of the law tend towards certainty and avoid uncertainty. The price current being fixed on one day, it certainly is reasonable to say that it devolves upon the party having the affirmative of the issue, and who is seeking a remedy, to show a change from the price thus established.

That the rules contemplated the possibility of the Exchange being closed on the last day of the month, is shown by Sec. 2 of Article 28 of the clearing house rules. It there provides that deliveries for the account shall be made on the last day of the month, but that where that day occurs on a holiday, "*or on a day when the Exchange is closed for business,*" then deliveries shall be made on the first business day preceding. The expression, "busi-

ness day," would seem clearly to refer to a day when the Exchange is open for business.

It may be that these rules do not provide with great certainty for the action of the members when the Exchange is closed for an unusually long period; but they show very clearly that deliveries are not to be made when the Exchange is closed for business, and that the liability of the defaulting party, if not fixed by a sale conducted by an officer of the Exchange, is to be fixed by the price current on the Exchange. If the price current is to be regarded as shown by the sales made on the last day when the Exchange was open, then no damages could be recoverable from Jamieson & Co., for that price was the same as the price at which they agreed to take the stock.

If, on the other hand, the price current on the day the contract matured is not to be fixed by the price on the last business day of the Exchange, then it must refer to the market value on that day. It certainly does not refer to the general market value as shown three weeks later, nor leave it within the control of the seller to enhance his damages by selling whenever he pleases.

There is no evidence in this case as to what the market value of the stock was on August 31st; therefore, if the market price on that day is the measure of the petitioners' rights, they have failed to show that they suffered any damage, and the bill was properly dismissed. Nor is there any evidence in the case of the value of the stock from August 31st to September 22d, nor any evidence of the value on the latter date, except such as is furnished by the transactions which the petitioners carried out on that day.

It is said, however, that when the Stock Exchange

opened in November, the settlement price of Diamond Match stock was below $130 a share, the price at which the fictitious sale was made; and, therefore, it is argued that Jamieson & Co. would not have been benefited if the petitioners had awaited the opening of the Stock Exchange, and closed the contract in accordance with its rules. The settlement price, it will be remembered, is an arbitrary one fixed at the close of the day's session as a basis for the adjustment of differences in the clearing house. (*Trans., p.* 108.) It always happens that actual sales are made on the floor at different prices, and the settlement price therefor does not show that sales at higher prices were not made. (Mr. Wilkins' testimony, *Trans., pp.* 108, 115.)

One of the reasons why members of a Stock Exchange are required to carry on their transactions on the floor of the Exchange, is because outside sales have an effect upon the market price, and yet are not carried on under the controlling influence of the Exchange itself. The very fact that a large block of this stock was offered at public sale outside the Exchange in this way would naturally have a tendency to affect the price when the Exchange opened. If it be said that this is a supposition, we answer this is no case for indulging presumptions in favor of the petitioners, as a means of sustaining their case.

If the contract required—as we contend it did—that a sale to fix the price should be made under the rules of the Exchange, and that the seller could not use as a means of fixing the buyer's liability, a sale made on the street, then Jamieson & Co. were entitled to stand upon the terms of their contract, and to have even the chance which

that contract provided for a lessening of their liability by a sale properly conducted.

And it is to be remembered that the petitioners did not even await the opening of the Stock Exchange before filing their bill. The bill was filed on September 25, 1898, three days after the fictitious sale was made. In any view, therefore, that can be taken of the matter, the commencement of the suit was premature.

If the seller was bound to make a sale through an officer of the Exchange, and was relieved from even requesting an officer to make such a sale until the Exchange was formally opened for business, then he had no right until that contingency occurred, to bring suit against the buyer.

If, on the other hand, the price current which should, in the absence of such a sale, fix the measure of the liability, was not to be determined by the price on the last day when the Exchange was open, then it would be the price on the next opening day.

Whichever view is taken, it leaves the petitioners in the attitude of bringing suit before the cause of action matured. This is not answered by saying that it did not injure the defendants. The question is not of injury to the defendants, but of the performance by the petitioners of a condition precedent to the exercise of the right to bring suit. They cannot enforce a contract, disregarding one of its terms, upon the theory that the performance of that condition would have been of no substantial benefit to the defendants. The defendants *were not bound to pay a[illegible] until the full maturity of the contract in accordance with its terms;* and whether waiting that period would compel them to pay a less or a greater sum is of no con-

cern to the petitioners, and does not hasten their right to bring suit.

The petitioners were advised that this defense was relied upon, for the rule upon which it is based was specifically set out in the answer filed by Jamieson & Co. They took their own construction of the contract, adopted their own method of carrying it out, and are in no position to ask anything more than the strictest interpretation of their contract would warrant.

The fictitious sale carried on by the petitioners bars them from relief.

If it be conceded that the petitioners had a right to fix the amount of their damages by a sale conducted upon proper notice, we still contend that the sale made in this case—so far from giving them a cause of action, destroyed their right to relief in equity.

This question does not involve the rules which counsel refer to, in cases in which a trustee, mortgagee, or other person selling the property, buys it in himself. In those cases counsel contend the sale is merely voidable, and the party whose rights were attempted to be cut off can sell, redeem or exercise his original rights.

The sale in this case was made as a means of fixing the market value of the stock, and of using the values as thus fixed as a basis for the claim against Jamieson & Co. The latter being abundantly solvent, it was to the interest of Clews & Co. to enhance their damages by a sale at a low figure. That a fictitious sale cannot be regarded by a court as fixing either market value, or as determining any similar question, is a proposition which we think can hardly be disputed. If it were, the drastic and severe rules of the Stock Exchange would them-

selves show how such sales are regarded by persons whose daily transactions depend upon market prices, which are fixed by purchases and sales.

Article 17 provides that no fictitious sales shall be made, and that members contravening this shall be suspended from the Exchange (*Trans., p. 13.*) And the rule with reference to sales on the Exchange on defaulted contracts, specifically provides that no party shall be permitted to supply offers to buy or sell securities closed for his account under the rule. (*Trans., pp. 33-4.*)

The sale made in this case was plainly a violation of these rules of the Stock Exchange, and of the principle upon which they are founded. The penalties imposed could not be exercised against Clews & Co., who were not members of the Exchange; but they certainly can acquire no right to fix the liability of Jamieson & Co. by claiming the benefit of one part of the rules and openly violating another part.

The sale in this case cannot fairly be characterized as anything more than a mere pretense. It was not a case of a mortgagee buying in the property and crediting a certain amount on his mortgage debt. There was, from the start, no intention of making an actual transfer of the property at all. Clews & Co. had provided in advance a nominal purchaser, and had authorized him to bid up as high as $135 a share. This would certainly seem to indicate, among other things, that $135, which was bid by Mr. Barber for a part of the stock, was a fair representation of its value. And if they had accepted the *bona fide* bid made by Mr. Barber for 200 shares at $135, and allowed their own fictitious purchaser to take in the rest at even the sum which he offered—$130, without going

to the limit of his instructions—it would have made a large money difference to Jamieson & Co. Or, if they had accepted the offer of $135 for 200 shares, and sold the other for $129, the settlement price on the day the Exchange opened, it would have made a difference of $500 in favor of Jamieson & Co.

But the sale had no actuality in it at all, nor was even the formality of handing the shares of stock to this prearranged purchaser observed. The stock did not belong to Clews & Co., and all they did was to agree with Swartz, Dupee & Co., who had it, that *if any outsider bought it,* Clews & Co. would replace it. No outsider did buy it, and therefore it never so much as left the hands of Schwartz, Dupee & Co.

This purpose was carried out by one who was interested in fixing a low price for the stock, and was doing this through a fictitious transaction, in order to create evidence to be used in court in a suit which was then contemplated against Jamieson & Co. And in the bill it was alleged as a genuine transaction, and an attempt made to prove it, until the calling of Mr. Gage as a witness compelled a disclosure of the real nature of the transaction. Does a complainant who thus seeks to impose upon both his adversary and the court enter a court of equity with clean hands?

The rule which denies relief to a complainant under such circumstances does not require that he should have been guilty of some positive fraud which would furnish the opposite party a right of action against him; it applies to those acts of bad faith and unfair dealing which are inconsistent with the stern casuistry of a court of equity,

and with the principles upon which it gives relief. Such is the case which is here presented.

1 Pomeroy's Eq. Jurisprudence, Sec. 397.

If all that we have said as to the terms of this contract and the right to have the damages determined by transactions on the Exchange be disregarded, still Jamieson & Co. were entitled to have their liability for damages fixed by a transaction which was not only a real one, but was carried out in good faith. And if the question as to the relation which these rules of the Stock Exchange have to the settlement of defaulted contracts is even a doubtful one, this but served to impose a greater obligation upon the petitioners to exercise good faith, and not to seek—as they did—to fix the rights of their buyers by a purely fictitious transaction.

III.

THE PETITIONERS CANNOT MAINTAIN A BILL IN EQUITY.

Conceding a contract to have been made between Clews & Co. and Jamieson & Co., and violated by the latter, is the remedy for the breach properly sought in equity?

The claim of the petitioners is, in its essence, merely a legal claim for the unliquidated damages resulting from a breach of contract. The right to enforce this claim in a court of equity is placed by counsel upon two grounds:

1. The existence of a trust fund in the hands of the Stock Exchange.

2. The absence of a legal remedy, because the contract was an entire one for 1,150 shares, in which Clews & Co. are interested only to the extent of 700 shares.

The mere existence of a trust fund furnished no reason for the bringing of a suit even against the trustee. There should be in addition some misapplication of it, either committed or threatened, or some refusal to apply it on proper request, to the purpose for which it was created. None of these elements are present in this case.

No suggestion is made, even in the bill, of an intention on the part of the Exchange to pay any part of the money to Jamieson & Co. or to misapply it in any way. There was not even a refusal to pay it to petitioners or to recognize their rights in it. All that is shown is that petitioners and Schwartz, Dupee & Co. on September 23d sent to Mr. Wilkins, the Secretary of the Stock Exchange, a letter demanding the fund and asserting an intention to apply it to their claim against Jamieson & Co. Not receiving any answer to this, they at once filed this bill on the 25th. At this time the Exchange was closed and the clearing house by which such payments were made had temporarily suspended operations. The fund was a security for the entire contract for 1,150 shares, and certainly it would not seem to be a violation of the trustee's duty to at least hold it long enough to consult the wishes and respect the rights of the other interested parties. The rule provides that such margins shall be held by the clearing house first for the protection of the members dealing through the clearing house with the member depositing the margin, and then held for ten days for the protection of other members of the Exchange. (*Trans.*, p. 127.) What the situation of Schwartz, Dupee & Co. was, or why this reasonable rule should not have been observed by the body which passed it, the petitioners did not think it necessary to show. There is certainly nothing in the evidence warranting the filing of a bill after a

lapse of one day after such a letter, or in taking what counsel call "the administration of the trust fund" out of the hands of the trustee.

Reliance is also placed by counsel upon the rules with reference to following trust funds. Those rules apply where the fund has been misapplied, or it was created by a wrongful act, as by the conversion of property. No theory of the facts in this case could furnish ground for the application of these rules.

It is constantly asserted by counsel that $7,000 of this fund was deposited by Clews & Co. Of this fact there is not the slightest evidence. The deposit, not of $7,000, but of $11,500, was made by Schwartz, Dupee & Co., and, as we have shown, it was to secure a contract to which petitioners were not parties. If petitioners furnished this money in any way or by any means, it would have been easy for them to show it. But the fact is that they did not. Counsel say they "must have" made a deposit upon the original contracts of July 25th and 27th. There is no evidence that they did even that; but if they did, that is the only deposit they ever made. The result of the clearing house transactions may have kept, and probably did keep, them indebted to Schwartz, Dupee & Co., but even that debt was not paid by them until after this suit was brought. There is a manifest difference between the mere balances, or debts between them and their brokers, and the creation by them of the specific fund deposited on August 3rd.

The other proposition on which equitable jurisdiction is based is that the contract is an entire one for 1,150 shares, and therefore a suit at law could not be brought upon it.

If Clews & Co. were parties to that contract, then the other client or clients of Schwartz, Dupee & Co., for whom the 450 shares were sold, were also parties, and entitled to enforce it. Their rights being thus joint, under an entire contract, there would seem to be no obstacle to a suit at law in their joint names. In reality counsel's proposition is that each of two joint sellers in a single contract of sale may maintain a bill to collect his share of the unliquidated damages caused by the buyer's default. This must sound strangely to the ear of both the equity and the common law pleader. If such a right exists, a reciprocal right must exist in the buyer, and he could therefore maintain a separate bill to collect from each seller his share of the damages.

But it is said that the Stock Exchange might have maintained a bill of interpleader, or Schwartz, Dupee & Co. might have filed a bill in their own names; and apparently from this hypothesis it is argued that the Circuit Court might have directed some of the defendants to file a cross-bill, even without their asking or even wishing to do so. We had supposed that the question was as to the right of the petitioners to maintain this bill, not as to the right of some one, who does not care to do so, to maintain some other kind of a bill. And we had not supposed that where a complainant had no right to sue, one of the defendants could better his case for him by filing a cross-bill. Schwartz, Dupee & Co. could not maintain a bill, for they admittedly have no claim. Neither they nor the Exchange have ever shown the slightest intention of bringing suit. This court sits to review the decree of the lower courts. Is it error for a court to dismiss a bill filed by a complainant without right because some one else might have maintained a suit if he had wished to bring it?

IV.

THE QUESTION OF THE LEGALITY OF THE CONTRACT DECIDED BY THE CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals decided this case upon the question of the legality of the contract, basing its decision solely upon the petitioner's own theory of the contract as shown in their evidence and as stated by their counsel in their briefs. Our clients did not raise that question, but based their defense upon the propositions which we have argued in this brief. A somewhat anomalous situation is now presented by the manner in which this question is brought before this court. Counsel for the Stock Exchange—who filed no brief in the Court of Appeals—have taken up the question here for the sole purpose of securing from this court a decision overruling the opinion of the Court of Appeals upon this point. The Exchange has, and professes to have, no concern whatever in the outcome of the case, in the judgment which the court shall pronounce, but only in the reasons which the court shall give for its judgment. And this interest is not limited to procuring an opinion in which the court leaves this question undecided, but one which expressly overrules the decision of the Court of Appeals, so that the Exchange will have a judicial precedent for use in other transactions sustaining the view which it thinks will best subserve its interests.

Clews & Co., on the other hand, are not interested in the question as an academic one, or for their guidance in other contracts, but for the practical financial interest which it has for them in the case in hand. They and the Stock Exchange—as petitioners and respondents—there-

fore united their efforts to procure the *certiorari* from this court, and in seeking its opinion upon this question.

Our clients Jamieson & Co., being members of the Stock Exchange, are interested in maintaining that contracts effected through it, and under its rules, do not contain those elements which, under the decisions of the courts (like that in *Dickson's Exr.* v. *Thomas*, 97 Penn. St., 278), would make them illegal *per se*. The only elements upon which this decision of illegality was based, were those which the petitioners brought into the case in endeavoring to formulate and to prove their theory of the contract, and of the meaning and intent of the usages of the Exchange. We therefore point out to the court, as a sort of summing up of our propositions, that our position, and that of our clients, maintains the legality of the transactions on the Exchange. And one reason why we do this is because we believe that if any of the positions which we have taken as to the construction of these contracts, and the rules of the Exchange is doubtful, the construction will be adopted which maintains their legality, rather than that which even suggests the contrary.

The petitioners contend that the original contract of sale as authorized by them and as made for them, provided—and therefore that both parties to it intended—that it could be altered each day, or even canceled, upon the payment of the difference between the contract price and the settling price on the day the change was made; that it could be settled in this way by a new contract at either a higher or a lower price, in one case the seller paying and in the other receiving the difference. And this was to be done when the petitioners had no stock on hand, but had sold "short" and would therefore have to buy it if they were to fulfill the sale by a delivery.

We contend that the petitioners' contract of sale bound them to deliver, and the buying broker and his principal to accept, the stock at the contract price; that this contract was not canceled or settled by payment of differences, so far as petitioners were concerned, nor did they intend that it should be; that it continued in force, and the only settlement or change was between the members of the Exchange, leaving the rights and liabilities of petitioners unaffected. The validity of that contract, as affected by an intention of the parties to it differing from its apparent form, does not concern Jamieson & Co.; for they were not the buyers in it.

Petitioners contend that by their original order to Schwartz, Dupee & Co., they intended to and did confer on them authority to merge the contract with the contracts of other customers, and other members of the Exchange and to make them parties to the contractual result, no matter how much it changed the original contract, and even though the substituted contract made the brokers buyers instead of sellers, upon receiving or paying the difference between the original sale price and the shifting prices on the days when the changes were made.

We contend that the petitioners did not become parties to these substituted contracts, or authorize the brokers to so bind them; that these settlements were only between the brokers, and did not enlarge or diminish the contract rights of their principals; and that so far as appears from the terms of the contract which petitioners authorized, it did not contemplate any such settlement of its apparent obligation to deliver the actual stock on August 31st as their construction would suggest.

This case is here for a review of the decree of the

lower court, not for the mere settling of legal propositions. Unless the petitioners sustained by a preponderance of evidence the allegations of their bill that they had made a contract with Jamieson & Co. which the latter had broken under such circumstances as to create an equitable right, and that they themselves have fulfilled all the requirements of the contract, then the decree of dismissal was right, whether a good or a bad reason was given for its entry.

Respectfully submitted.

SAMUEL P. MCCONNELL,
HORACE KENT TENNEY,
M. LESTER COFFEEN,
CHARLES F. HARDING,
JAMES H. WILKERSON,
Solicitors and Counsel for Respondents,
Jamieson & Co.

No. 245.

APR 10 1901

JAMES H. McKENNEY, Clerk.

Brf. of Hamline & Scott for Respts

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

Filed April 10, 1901.

NO. 245.

Henry Clews et al. *vs.* Malcolm M. Jamieson, Roland C. Nickerson and Harry F. Billings, Co-partners, and Edwin G. Foreman and Charles Henrotin et al., composing the Governing Committee of the Chicago Stock Exchange, *Respondents.*	Certiorari to the Circuit Court of Appeals, Seventh Circuit.

BRIEF FOR THE RESPONDENTS

EDWIN G. FOREMAN AND CHARLES HENROTIN ET AL., COMPOSING THE GOVERNING COMMITTEE OF THE CHICAGO STOCK EXCHANGE.

JOHN H. HAMLINE,
FRANK H. SCOTT,
FRANK E. LORD,
SOLICITORS FOR SAID RESPONDENTS.

JOHN H. HAMLINE,
OF COUNSEL.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

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BRIEF FOR THE RESPONDENTS EDWIN G. FOREMAN AND CHARLES HENROTIN ET AL., COMPOSING THE GOVERNING COMMITTEE OF THE CHICAGO STOCK EXCHANGE.

"He likewise did much for the improvement of commercial law in this country, by rearing a body of special jurymen at Guild Hall, who were generally returned in all commercial cases to be tried there. He was on terms of the most familiar intercourse with them, not only conversing fully with them in court, but inviting them to dine with him. *From them he learned the usages of trade.*"

Sketch of Lord Mansfield, 3 Campbell's Chief Justices of England, p. 304, foot note 2.

STATEMENT OF CASE.

In this case the respondents, Edwin G. Foreman *et al.*, comprising the Governing Committee of the Chicago Stock Exchange, hold in their possession $14,000 in margins. Seven thousand dollars of this amount was placed there by Schwartz, Dupee & Co., brokers on the Chicago Stock Exchange, as agents for the petitioners, Henry Clews & Co., of New York; and $7,000 thereof was placed in their hands by the respondents, Jamieson & Co., brokers on the Chicago Stock Exchange. These sums were paid by said parties in accordance with the rules of the Chicago Stock Exchange to secure the performance of the contract of Jamieson & Co. to purchase 700 shares of Diamond Match stock from petitioners' brokers, Schwartz, Dupee & Co. The payments and said contract are all the result of certain orders given by Clews & Co. to said Schwartz, Dupee & Co. to sell said shares "for the account," through the agency of the Clearing House of the Chicago Stock Exchange. These orders we will presently explain. Suffice it now to say that Clews & Co. filed their bill in the United States Circuit Court for the Northern District of Illinois against said Jamieson & Co. and the Governing Committee of said Stock Exchange, as well as against Schwartz, Dupee & Co., charging that in the month of July, 1896, complainants had ordered their said Chicago brokers to sell on the Chicago Stock Exchange, according to the rules of said exchange, 700 shares of Diamond Match Company stock for delivery August 31, 1896; and that on August 3, 1896, said brokers sold to the defendants Jamieson & Co.

1,150 shares of said stock and contracted to deliver them on August 31, 1896, to Jamieson & Co., or such persons as might, under the rules of the exchange, be substituted therefor, and that Jamieson & Co. contracted to receive said stock at said date and pay therefor $222 per share; that while said sale of 1,150 shares was made in the name of Schwartz, Dupee & Co., as to 700 of said shares they were acting for and in behalf of complainants, while, as to the remaining 450 shares, they were acting in behalf of other clients of theirs.

The bill charges that Jamieson & Co. had refused to take said 700 shares of Diamond Match stock, although the same were tendered to them on delivery day by complainants; that subsequently, and by reason of said default, the shares were sold in the market at $130 a share, and as a result thereof complainants sustained a loss of $64,400.

The bill further charges that the Governing Committee of said Exchange has in its possession said trust fund of $14,000, put up as margins by the respective parties to said contract; that Jamieson & Co. refuse to permit the Stock Exchange to pay said trust fund over to complainants, and the latter pray for an accounting with Jamieson & Co., and that the said committee be decreed to pay said trust fund over to the complainants, and that Jamieson & Co. be decreed to pay to the complainants said $64,400, less $7,000 of said trust fund. (Transcript, pp. 54–59.) We will not repeat the history of the pleading. Suffice it to say that after answers were filed by all the defendants and the case was put at issue it was referred to Master in Chancery Sherman to take evidence and report his conclusions, and later on the master reported thereon in favor of the complainants; he holding that the

governing committee should pay to the complainants said trust fund of $14,000, and the defendants Jamieson & Co. should pay to the complainants said sum of $64,400, less $7,000 of said defendants' money to be paid by the Governing Committee as aforesaid. (Transcript, pp. 29–50.)

Upon exceptions to the master's report filed by Jamieson & Co., Judge Grosscup dismissed the bill for lack of equity. In the opinion he filed he announced that while an enforceable contract was entered into between Schwartz, Dupee & Co. and Jamieson & Co. for 700 shares of Diamond Match stock to be taken by Jamieson & Co. at $222 per share on the 31st day of August, 1896, from Schwartz, Dupee & Co., and while their undisclosed principals might enforce any contract said brokers made for them, yet inasmuch as Clews & Co. had authorized a sale of 700 shares of Diamond Match only at $229 per share, their brokers had no authority to sell for $222 her share, and therefore Clews & Co. were not bound by the contract Schwartz, Dupee & Co. had entered into for them. He also held that if the contract could not be enforced against Clews & Co. it could not be enforced in their favor on account of lack of mutuality. While the court recognized that parties who were brought together by means of the Clearing House system and their principals were in privity where the terms of the original order were carried out, nevertheless he held the Clearing House system, under which Jamieson & Co. became substituted as purchasers of the stocks Clews & Co. had ordered Schwartz, Dupee & Co. to sell for them, could not change so important a feature of Clews & Co.'s contract as the price, without their conscious assent. (Trans., pp. 80–83.)

As we shall presently show in explaining the Clearing House, Judge Grosscup did not understand it at all, and his claim that Clews & Co. were not to receive $229 a share by virtue of their brokers' action is directly contrary to the facts. However, on appeal from this decree, the United States Circuit Court of Appeals for the Seventh Circuit paid no attention to Judge Grosscup's opinion, or the grounds therefor; but assuming that there was privity between Clews & Co. and Jamieson & Co. and a contract existed between them, yet on their own initiative held that instead of its being a contract for a *bona fide* purchase and sale of stock, it was either a mere wagering transaction or a contract in options. (Trans., pp. 156–161.)

This opinion is due to that court's misunderstanding the real facts in the case, the true nature of the Clearing House of the Chicago Stock Exchange and the contracts there entered into. The decision of Judge Grosscup, if followed, destroys the Clearing House system which prevails in all the exchanges of the world, by preventing the customer from enforcing the contracts his broker makes for him. The opinion of the Court of Appeals puts the stamp of gambling on all contracts for future delivery on stock exchanges. Now, it is a matter of entire indifference to the Chicago Stock Exchange and its Governing Committee to whom they pay the $14,000 which they hold in their hands. It is true that if this decree is not reversed, they would then be liable to another action by Schwartz, Dupee & Co. as well as by Jamieson & Co. for the moneys in their hands. It is also true that in order to avoid a multiplicity of suits, it is highly desirable that a final decree be entered in this case directing said Governing Committee what to do with this money which

they hold and which does not belong to them. But the real reason for their acquiescing in the petition for *certiorari* and inviting the review of the rulings of the lower courts is this: So long as the opinion of the United States Circuit Court of Appeals for the Seventh Circuit stands unreversed, just so long can any non-resident who trades in the account on the Chicago Stock Exchange escape carrying out his contract by setting up that the transaction has been held to be gambling by the court of last resort in that jurisdiction for cases of this nature. Inasmuch as said Court of Appeals discussed and decided that question without the point being raised by the pleadings, the decree of the lower court, or the briefs of counsel, we feel justified in asking this court, no matter whether it affirms or reverses the decree, to consider and pass upon such question, so that if this court should be of opinion that the transaction in question is not gambling, it will say so, and permit trading upon the stock exchanges of this country to be freed from the cloud said opinion casts upon it. And this is no idle request.

The writer recalls hearing Judge Taft read a paper before the American Bar Association at Detroit in 1895 in which he stated that seven-eighths of the active capital of this country had assumed the corporate form. (18 Reports American Bar Association, 243.) Since that time corporations have so engrossed the business and property of the country that it is not far from the mark to say that the entire active capital of the country is practically represented by the stocks of corporations. Within a short time so great facilities have been afforded by the laws of some of the states for the consolidations of corporations, that now probably less than fifty gigantic corporations carry on the business formerly carried on by thou-

sands of corporations. The result has been to more and more throw upon the stock exchanges of the country the function of affording safe, quick and sure markets for the transfers of the capital of these corporations. When the capital stock of these corporations changes hands, the active capital of the country changes owners. The capital stock of these corporations are the evidences of title to and ownership of a large portion of the property of the country. The sole public market for these stocks are the stock exchanges of the large cities. Hence, anything that checks the quick and safe transfer of these stocks upon said exchanges or that renders contracts respecting their sale on said exchanges insecure, is a clog on commerce and a burden upon the capital of the country. The decision of the United States Circuit Court of Appeals for the Seventh Circuit, if allowed to stand, seriously menaces the work of such exchanges. Similar reasons exist for asking you to consider and determine whether the stock exchanges shall be deprived of the benefits of the Clearing House system by the opinion of Judge Grosscup. It is because the judges of the lower court failed to understand the rules and usages of the Stock Exchange as did the parties, that we call the attention of this court to the practice of Lord Mansfield. The principles which we respectfully submit should govern the determination of such questions is that employed by Lord Mansfield in *Heylyr* v. *Adamson*, 2 Burr, 669, in promulgating the rules which now govern bills of exchange:

"I cannot persuade myself that there has really been such a variety of opinions on this subject; but, however that may be, it must now be determined *by the nature of the transaction, general convenience, and mercantile usage.*"

The propositions of law which should govern these transactions will instantly be apprehended by the court as soon as the facts are clearly stated. But the facts to which they should be applied, though simple when explained, appear to be extremely complicated and are easily misunderstood by anyone who has never attempted to buy stocks or products at the great markets of the land.

With your permission, we will explain in detail just how the transactions here involved took place, and their real character.

During the year 1896, and for a long time prior thereto, our co-defendants, Schwartz, Dupee & Co., were brokers in stocks and bonds in Chicago, and members of the Chicago Stock Exchange. They had been for many years the Chicago correspondents of the well-known New York brokerage house of Henry Clews & Co. (Trans., p. 98.) The latter were then, as now, stock brokers in New York City and the New York correspondents of Schwartz, Dupee & Co. (Trans., p. 100.)

The Chicago Stock Exchange is a voluntary association of brokers, organized for the purpose of furnishing a Chicago market for stocks, bonds and other collaterals listed on that exchange. The exchange has a trading room in a building named after it in the City of Chicago, and local stocks, bonds and securities have their sole public market on the floor of said exchange. (Trans., p. 107.) This market is conducted in the following manner: At 10 o'clock in the forenoon of each business day, Joseph R. Wilkins, the chairman of said exchange, calls off the official printed list of securities, stocks and bonds, listed on said exchange, and anybody that wants

to buy anything on the list makes a bid, and anybody who wants to sell anything so listed makes an offer. When any bid or offer is accepted, the sale so made is entered by a clerk of the exchange under the directions of Mr. Wilkins. When that call is over, an irregular session is had, during which trades are arranged but no call made, which lasts until half past 1. At that hour Wilkins makes another call, which is confined to the different stocks that are in the Clearing House of the said exchange, a description of which Clearing House we will presently give. The last price bid for a stock before Wilkins brings down his gavel at the close of this call is the Clearing House price of that stock for that day. At 2 o'clock each day the exchange adjourns. (Trans., pp. 107-116.)

As no one but members of the exchange are permitted to deal on the floor of the exchange, outsiders like you or I or Clews & Co. have to employ a member of the exchange to carry out our orders at this market. All transactions of buying and selling must take place between members of said exchange, the principals of the brokers being as a rule unknown in the transaction. The trading is either for immediate or future delivery. In cash trades or immediate deliveries all stocks and securities sold are required by the rules of said exchange to be delivered before 1:30 o'clock of that day. In the case of stocks sold for future delivery, the securities are required by the rules of the board to be delivered on the last day of the month in which the contract is made. That day is known as the delivery day for that month. (Trans., p. 110.)

In July and August, 1896, the Diamond Match Company's stock was one of the stocks listed upon said ex-

change. (Trans., p. 108.) At that time, and during the events herein referred to, the defendants Jamieson & Co. were stock brokers in the Chicago Stock Exchange, and Mr. Jamieson, the senior member of that firm, was president of the Chicago Stock Exchange, and by virtue of his office chairman of the Governing Committee thereof. (Art. VI, Constitution; Trans., p. 120.)

July 16, 1896, at 11:19 A. M., Schwartz, Dupee & Co., in Chicago, received the following order from H. Clews & Co. in New York, by wire, to-wit:

"Sell 500 Diamond Match at 220½ *for* ⁰/꜀
(Signed) H. CLEWS & Co."

On the 20th of July, 1896, at 9:23 A. M., the same parties received another order from Clews & Co., as follows:

"Sell 200 Diamond Match at 221 *for the account* at opening of market. They want put out at opening if possible but it is good all day.
(Signed) CLEWS."
(Trans., p. 103.)

If you or I were present when these dispatches were received we would know therefrom that Clews & Co. wanted their Chicago correspondent to sell Diamond Match stock in the Chicago market at a certain price. We would probably know that the only market for said stock was the Chicago Stock Exchange, and that that was the market on the opening of which Clews ordered the 200 shares sold. We would also know that Clews & Co., having directed their agent to go into that market and make the sale, intended that such sale should be made with reference to the rules and customs of said market. But we would not know for the life of us what Clews & Co. meant by ordering the stock sold "for the account,"

or in what manner the Chicago brokers were to execute orders of this kind for Clews & Co. To find out what Clews & Co. meant by the words "for the account" we would have to inquire at the market where the sale was ordered made. Had we done so we would have found that the rules of the Chicago Stock Exchange furnished an elaborate scheme for trading "for the account," and that all trades "for the account" had to be made in conformity with the Clearing House rules of said exchange. When we became acquainted with those rules and learned how they were carried out, we would, for the first time, be able to translate the technical language employed by Clews & Co., and learn what Clews & Co. meant by ordering Schwartz, Dupee & Co. to sell "for the account." We would have learned from these rules not only that all sales of stock "for the account" had to be made under the rules of the Clearing House of said exchange (Sec. 1), but the stock must be delivered on the last day of the month. (Sec. 2.) (Trans., p. 125.)

We know, without being told, that if Schwartz, Dupee & Co. had only one contract for a principal to sell and had made only one contract for another principal to buy, they would require from the buying principal that he should take the shares sold, and from the selling principal that he should supply the buying principal with the shares bought. But if they have a large business, many customers, some buying, others selling, or if they carry trades over, it is plain that these brokers would, on behalf of their customers, seek to devise some way for a transfer of the balance of such shares only.

We also know, without being told, that Clews & Co.'s brokers, if they had much business, might in the interval before the delivery day have bought the same kind of

stock for one client and sold it for another. Many other brokers might have sold and bought the same kind of stock and the same brokers might have had reciprocal dealings with Shwartz, Dupee & Co. and with each other. To obviate the needless expense, trouble and risk of daily putting up margins on allthese transactions with each other and making actual transfers of stock for each transaction, and paying by checks on delivery day, we would find on inquiry that the rules of the Stock Exchange had created the machinery of the Clearing House, by means of which each member so dealing after clearing with himself daily clears with his fellows. To accomplish this the rules require each member who, on any given day, buys or sells stock "for the account," to prepare a statement setting out all purchases and sales that day made by him on blanks furnished by the manager of the Clearing House, and to deliver the same, properly filled out, balanced and signed to said manager before 9:45 A. M. (Sec. 3.) If the broker's sales and purchases of the same stock are shown to be the same in amount he no longer needs the intervention of the Clearing House to clear his stocks, and so goes out of the house with that stock until he buys or sells some more. But if the contract for sales of a certain stock which the broker has made exceeds his contracts for purchases of the same stock, then the manager of the Clearing House is authorized by the rules to find some party or parties who have a balance of excess stock bought, and substitute this party as the purchaser from the seller for excess stock sold instead of the original purchaser. (Sec. 5.) This process is kept up every day until "delivery day" for that month's account. Upon delivery day the party then found to be substituted by the manager of the Clearing

House as purchaser, instead of the original purchaser, takes and pays for the stock so originally sold. See 6]Transcript, p. 126].

All exchanges require, and it is the essence of all contracts for future delivery that margins to secure the performance of the contract be put up by both sides to the contract. The propriety of requiring some such security is obvious and its legality has never been questioned.

To furnish this security, section 12 of these rules requires a margin of $10 a share of par value of $100 or over to be deposited with the Clearing House on all stocks traded in the Clearing House. These margins are by section 13 considered as a margin or part of a margin required by section 1 of article XVI of the by-laws to be kept up on trades outside of the Clearing House. But if 100 shares of Diamond Match be sold to-day at par for future delivery, or $10,000, and each side puts up ten points, or $1,000 each, it is plainthat if the stock goes down eleven points to-morrow, so that the stock which the seller has is worth but $8,900, then the stock itself and the $1,000 margin put up by the buyer is not sufficient security to the seller for his contract under which he expects to get $10,000 from the buyer. To provide for keeping this margin good to meet such declines said Sec. 1, of Art. XVI requires that whenever the market price of the securities shall change so as to reduce the margin of either party below $10 per share, par $100, either party may call for a deposit sufficient to restore the margin to $10, and this may repeated as often as the margin may be reduced. On the contrary, the $1,000 in the case supposed which the seller has up is more than sufficient security for the buyer on the basis of seller having up ten points

as security against his default. It follows that there is no need for seller to keep that extra point up as margin, and he is permitted to withdraw it, leaving the trade still margined ten points on the value. This system is daily enforced in the Clearing House. The result is that when Clews & Co. ordered 500 shares sold at $220\frac{1}{2}$ on July 16, 1896, their brokers had to put up in the Clearing House for them $5,000 as margins, and when they ordered 200 shares more sold on the 20th they had to put up $2,000 more. Now, if the price of that stock went up a point, there not being enough margins up by Clews & Co. to keep the $10 a share par value, it would be necessary for Clews & Co.'s brokers to put up $500. For the same reason, upon the going down of the stock, while the other party to the contract would have to put up $500 more of his money so as to secure the fulfillment of his contract, Clews & Co. would be permitted to withdraw of their margins $500, or just the amount the other party is required to pay. When such extra margin is due from the seller he is required by section 3 to give his check to the manager of the Clearing House for that amount. At the same time the buyer draws a draft in his own favor, upon the bank designated by the Clearing House, and the draft if approved by the manager is accepted by said bank, and then returned by the manager to the buyer, all as provided in Sec. 4. (Trans., p. 126.) In this way the margins required are always kept in the Clearing House. In order to make the Clearing House system work, and to clear the stocks therein, all stocks go in every morning at the price fixed daily by Wilkins, the manager of the Clearing House at his 1:30 call of the day before. (Trans., p. 115.)

The result is that if the 500 shares of stock went

into the Clearing House at 221½ on the 16th of July, and kept going down, margins would be daily paid in by the buyer as fast as the price went down and daily taken out from the Clearing House by the broker for Clews & Co. It follows that if by July delivery day Match had gone down to 200, Schwartz, Dupee & Co. would have in the interim received for Clews & Co. the difference between 221½ and 200, at which price the substituted buyer would take it, and Clews & Co. would by the July delivery day get $21.50 per share out of the Clearing House and on the delivery day get $200 more a share, or their contract price of 221½ for the stock they had ordered sold.

Now, this is what we would find Schwartz, Dupee & Co. were ordered to do when in July Clews & Co. ordered them to sell "for the account" 700 shares of Diamond Match on the Chicago Stock Exchange.

The stipulation of the parties upon the trial of the case reads as folloms:

"It is further stipulated that the orders of Henry Clews & Co. to Schwartz, Dupee & Co. contained in said messages were as a matter of fact executed as set forth in the aforesaid messages from Schwartz, Dupee & Co. in the Chicago Stock Exchange." (Trans., p. 104.)

These messages report what the Chicago brokers did with Clews & Co.'s orders.

On July 16, 1896, at 11:35 A. M., Schwartz, Dupee & Co. wired Clews & Co. in response to their first order:

"Sold 500 Diamond Match at 221½ *for the account.*
(Signed) SCHWARTZ, DUPEE & CO."

And on July 20, 1896, at 10:08 A. M., they telegraphed to Clews & Co. in response to the second order:

"Sold 200 Diamond Match 221½ *for the account.*
(Signed) SCHWARTZ, DUPEE & CO."

There is no question then but that Schwartz, Dupee & Co. did what Clews & Co. ordered them to do. (Trans., p. 103.)

Clews & Co. are certainly presumed to have intended to have Schwartz, Dupee & Co. do the very thing they ordered them to do. If they had ordered the latter to kill a man and the latter did it, Clews & Co., or anyone else, would not be heard to say that they did not intend the necessary result of their own order, and if they ordered them to kill a man by guillotining him, for like reasons, they could not be heard to say they did not know that a guillotine cut a man's head off. In like manner, when they told Schwartz. Dupee & Co. to sell Diamond Match on the Chicago Stock Exchange "*for the account*" the latter had to carry out the order in the manner called for by the dispatch. As the latter were members of the Chicago Stock Exchange, the order was as well understood by them as though they had been ordered to sell pork or dry goods.

It follows that the question does not arise in this case whether Clews & Co. knew about trading "for the account" in the Chicago Stock Exchange, for it is the very thing they ordered done.

In fine, Clews & Co. made these orders, and Schwartz, Dupee & Co. accepted their execution with reference to all the rules and customs of the Chicago Stock Exchange governing trading in the account, and they all form a part of the contract Clews & Co. ordered made.

But it frequently happens on exchanges that before the day arrives for delivery of the stock, the seller or buyer desires to postpone the delivery for another month; the buyer may not be ready to

pay for it and wants it carried over for a month. The most complicated way to do this would be for him to find some one who for a consideration is willing to buy the stock on the delivery day and hold it for him for another month, charging him interest or compensation for the favor and for the money employed, the first buyer engaging at the end of that time to take possession of the stock and repay the money. But a simpler way is to go to the seller and pay him interest or carrying charges to *make a new contract* for the next month's delivery. This premium is added to the price of sale for the current account and makes the actual buying price for the next account larger by that amount. This premium or charge is regulated by the nature of the security, by the value of the money, by the demand existing for the accommodation, and by the credit of the person seeking the accommodation. This practice of carrying over has long obtained in England, from whence we got the idea of the stock exchange and clearing house. In that country the consideration paid by the buyer to the seller who agrees to postpone delivery is called "contango." When the seller pays the premium for the carrying over his trade, it is called "backwardation." The process of carrying over is described by Melscheimer and Laurence in their treatise on the laws and customs of the London Stock Exchange at page 10, as follows:

"The vendor of the stock (in consideration of a payment made to him by the buyer) enters into two contracts with the buyer—one a contract for the purchase of the same amount of stock as he has contracted to sell (such contract to be completed on the settling day so as to cancel the subsisting contract), and the other a fresh contract for the sale of the same amount of stock

to be completed on the subsequent settling day. The result is that the vendor and purchaser stand in precisely the same position as if there had been no previous contract (except as regards payment of the consideration), because the difference between the original contract price and the price at which the carrying over is effected must be paid at once—that is to say, on the settling day. The nominal price of the security at which the carrying over is effected would obviously be quite immaterial to the parties, since the two contracts balance one another, were it not that this difference is payable immediately. Being payable immediately, more bargaining would become necessary to fix the price for the new contracts; but this is obviated by the publication of a list of 'making-up prices,' which are, in round figures, the approximate values of all the recognized securities on that day, as settled by the clerks of the house in the various markets, and are usually based upon the average price of the first two or three hours of the day. In case of any dispute as to the making-up prices, or of any omission in fixing them, the clerk acts upon the decision of two members of the committee. All continuations must be effected at these prices, or, where no such prices have been fixed, at the then existing market price.

"The consideration thus paid by the buyer, for which the vendor agrees to postpone the delivery of the stock he has sold to a future specified date, is called a '*contango*'; on the other hand, a "*backwardation*' is the premium paid by a seller of stock for the privilege of postponing his delivery of such stock from and to a specified date.

"Inasmuch as the vendor and purchaser stand in the same position after the continuation as if there had been no previous contract, the continuation may equally be effected between persons other than the parties to the previous contract, and this is frequently the case. Let us suppose that a 'bull account' exists in the particular stock with which we have to deal—that is, that the amount of stock bought for the settlement is greater than the buyers are prepared to take up (we may here premise that every bargain in the stock must be and is settled

on the account day); a person who has bought stock for which he is unable or unwilling to pay must then find some one who, for a consideration, is willing to stand in his place by taking up such stock at the making-up price, and holding it for a specified time, charging a rate of interest for the money employed, and holding the stock as security; the real buyer engaging, at the end of that time, to take possession of the stock, by repayment of the money.

"The continuation may, of course, be effected outside the stock exchange; but, for its more easy explanation, we will suppose that a purchaser has given his broker instructions to continue the stock for which he is liable to pay, and that the broker carries out the transaction with a member of the house. This carrying-over is, as we have seen, not necessarily effected with the dealer from whom the original purchase was made, though this is very generally the case; but the broker finds some dealer in this stock who has money to employ, or who is out of the stock, and agrees with him for the accommodation at the market rate. The broker then renders a contract to his client, showing the sale of his stock at the making-up price for the current account, and its repurchase for the next account at the same price, but with an addition representing the value of the money practically borrowed by his client, together with the monetary consideration, if any, for the accommodation; and in the case of registered securities, if the lender of the money is obliged to take them into his own name, this will include the cost of stamps and transfer fees, from the payment of which the client is *pro tempore* relieved. It is this difference between the price of sale for the current account and the actual buying price for the next account, which is called a '*contango*'; and *this*, as will be easily seen, *will be regulated partly by the nature of the security, partly by the value of money, and partly by the demand existing for such accommodation; and will also be affected by the individual credit of the person seeking the accommodation.*"

Dos Passos Stock Brokers, p. 270, note.

On the Chicago Stock Exchange this fee has no special name, but Mr. Wilkins says it is the compensation "or

charge for carrying the stock for another broker for another month." (Trans., p. 111.)

This carrying over assumes a variety of forms. To make even figures, we will suppose the purchaser of the 500 shares of Diamond Match for July account has agreed to pay Clews & Co. $221 per share, or $110,500. The interest on this amount of money, if borrowed for one month at 6 per cent. from a bank would be $552.50. We will suppose this buyer does not want to take and pay for this stock on the last day of July, and lay out $110,500 therefor, but does want to get a month's time, so as to have the stock delivered on the August delivery day instead of the July delivery day. For this accommodation, he will be willing to pay the seller, or anyone else, at least as much interest as he would have to pay at the bank for the use of that much money for one month. But if he went to the bank to get the money he would not only have to pay interest, but would have to put up the stock as collateral, which would frustrate his carrying over his trade. Any system by which he can get the postponement without being obliged to borrow that sum or take up the stock will greatly convenience him, and for this accommodation he is willing to pay. Experience in the trade has shown that such purchaser is willing to pay for this accommodation, which he can readily get on the exchange, very much higher interest than he would pay at the bank, even if he were able to borrow that much money at the bank. The carrying rate, or interest, charged at this time on the Stock Exchange, for carrying stocks a month, it seems, ran from $2 to $2.50 a share. A firm like Clews & Co., with plenty of capital, could afford to carry stocks over to get the high rate of interest buyers would pay for such accommodation, as Clews &

Co. could borrow money at the bank at the lowest rate. If the party to whom Clews & Co.'s brokers had sold it, whom we will call A, didn't want to pay for it on the July delivery day, but would pay interest at $2.50 per share, or even $2 a share, Clews & Co. could make money by letting him have the time and carry the trade—that is, not deliver the stock for another month.

But we will suppose, on the contrary, that Clews & Co.'s purchaser, whom we will call A, wanted the delivery of the stock on the July account day, then Clews & Co.'s Brokers might hunt up some third party, B, in the market, who had bought 500 shares of C, a fourth party, but didn't want to pay for it uhtil the next delivery day, then Clews & Co.'s brokers would buy of B at the market price his right to such 500 shares, get an order from B on C to deliver shares to A, and in turn sell back to B for August delivery 500 shares which were originally sold to A, at the market price, plus interest or carrying charges. In other words, with the consent of all parties and by this process of buying and selling, Clews & Co. could earn the carrying charges, or "contango," as our English friends call it, and substitute B for A in the new trade.

All this is so abstruse to the legal mind that even at this late day English jurists who refer to the practice of carrying over refer back to earlier cases, where it is sufficiently explained. *Vide In Re Overweg*, L. R. (1900), 1 Ch., Part .2, p. 211. But when it is explained it is all very simple.

To facilitate the carrying over of trades from the delivery day of one month to that of the following month, the rules and practices of the exchange provide, after the 25th of each month, for trading in what is known as

the "second account." From that date until the day before the end of the month, Wilkins calls stocks in the first account and also in the second account, the first account being the account of the current month, and the second account the account for the month following. This allows an interval of four or five days for the members so desiring to arrange for turning over their trades to the next month. On the day before the last of the month, or delivery day, the calling of the two accounts stops, and the call is made solely of the account for the following month. (Trans., p. 110.)

Clews & Co. sought to earn some carrying charges on their sales, and on the 25th of July, 1896, at 11:41 A. M., Clews & Co. in New York telegraphed to Schwartz, Dupee & Co. in Chicago, to see if they could not get somebody to pay 2½ per cent. carrying charges, or "contango," for carrying the July sale to August delivery. The dispatch is as follows:

"Change Diamond Match over to August account, at 2½%. If you can do it let us know at once.

(Signed) CLEWS."

Shortly thereafter, but on the same day, to-wit, at 11:48 A. M., Clews having evidently received a reply that his brokers could get 2½ per cent., sent another dispatch to Schwartz, Dupee & Co., as follows:

"You sent us the difference this morning at 2½. At what difference can you do it now?

(Signed) HENRY CLEWS & CO."

On the same day, at 11:58 A. M., Clews & Co. telegraphed to Schwartz, Dupee & Co., Chicago, as follows:

"Change the 500 at 2 cents or better.

(Signed) CLEWS."

(Trans., p. 103.)

The 2½ per cent. in the first dispatch of July 25th and

the 2 cents in the last dispatch of July 25th, above referred to, were not claims, nor differences in settlement of stocks, but, as Wilkins testifies, was interest, pure and simple, or carrying charges. The same is true of the figures 2¼, which appear in the second quoted dispatch, sent by Henry Clews & Co. to Schwartz, Dupee & Co. on July 25th. (Trans., p. 111.)

And right here is the mistake of fact that Judge Seaman made, upon which he based the opinion delivered in behalf of the United States Circuit Court of Appeals for the Seventh Circuit, that the transaction was a gambling transaction.

He thought the 2¼ was the settlement of the differences between the contract and market price of those July trades, and that the word "difference" in the dispatch of July 25th, at 11:48 A. M., referred to gambling differences; but, as we have explained, it is nothing of the kind, but is simply the "contango" that the buyer is willing to pay for carrying the trade over for another month. It differed in no way, as you see, from the charge the buyer would have to pay if he went to the bank and got the use of the money represented by the stock for thirty days. It depended in no way upon the price of the stock, and in no way represented or marked the difference between what the stock was originally contracted to be sold for and the market price at the date of the turning over, but was entirely dependent on the credit of the purchaser and the money market, which in the middle of the Bryan campaign of 1896 was very high.

Suppose I make a contract to sell a piece of real estate for $10,000, the deed to be delivered thirty days after the date of the contract, and to be paid for on delivery.

Before the delivery day for the deed, the purchaser comes to me and says: "I don't want to take that deed and pay that money for another thirty days. What will you charge me to extend the time?" I reply, "I will charge you $100." He accepts, pays the premium, and the time is extended. There is no element of gambling about such a transaction. And yet that is just what the Circuit Court of Appeals held was gambling.

It is not surprising, however, that that court entirely failed to grasp this transaction. For no question having been raised about it in the briefs, the counsel for complainants did not take the time to explain the transaction to the court as it is described by Wilkins in the evidence.

During the four or five days while the second account is being called the purchaser who desires to carry over his trade is enabled to arrange with other parties to stand in his shoes, or arrange with his seller for the latter to buy back from him at the purchase price and make a new sale at current price, plus the "contango." This new sale when made is announced on the call of the second account which Wilkins makes. This new sale for the current price, plus the premium or "contango," would then go into the Clearing House and the "contango" would be collected at once in the following manner: There would be added to the margins of ten points on the current price, additional margins equivalent to the "contango." This would be drawn out by the seller's broker for him, and the seller would thereby receive his carrying charges or "contango" at once. There can be no question made in this case as to whether Clews & Co. knew all about this, because it is the very thing they ordered their brokers to do.

Schwartz, Dupee & Co., on behalf of Clews & Co., carried out these later orders in the following manner: On July 25th they bought for Clews & Co. 500 shares of July stock of four different parties at 227, evidently the current price at that day, and did at once sell it back to the same parties at the same price, plus the $2 per share interest for the August account. See Schwartz, Dupee & Co.'s trades in Match stock for July 25. (Trans., p. 67.) The latter then made a report of the transaction by wire to Clews & Co. at New York at 12:11 P. M., as follow:

"Bought Diamond Match 227 for the account. Sold 500 229, account 2nd.

(Signed) SCHWARTZ, DUPEE & CO."

On July 27, 1896, at 8:55 A. M., Clews & Co. telegraphed Schwartz, Dupee & Co. as folows:

"Change 200 more Diamond Match 2 per cent. or better.

(Signed) CLEWS."

And on the same day at 10:53 A. M., Schwartz, Dupee & Co. made a similar "contango," by buying said shares for July account of Peters at 226¾, and selling them back to them at 229 for August account. (Trans., p. 70.) They made report of their performance of said order in the following dispatches sent to Clews & Co. The first dispatch announced that the change had been arranged for and is as follows:

"We changed 200 match at 2¼ difference. Will give you prices later.

SCHWARTZ, DUPEE & CO."

On the same day, at 10:55 A. M., Schwartz, Dupee & Co. telegraphed Clews that the turn-over had been completed, as follows:

"Bought 200 Match 226¾. Sold 200 2nd account, 229." (Trans., pp. 103-104.)

In this manner the whole 700 shares which Clews & Co. had sold on July 16 and 20 for the July account were on the 25th and 27th carried over to the second or August account. From these dates new and entirely different contracts from those entered into on July 16 and 20 were in force. The $2 a share on the 500 shares which was changed over on July 25, and the $2.25 on the 200 shares which was changed over on July 27, the court will kindly bear in mind, is simply interest or carrying charges. If it were the difference between the sale on July 16th of 500 shares and the current price on July 25th Clews & Co. would have to pay Jamieson 5⅞ points. In like manner on the 200 shares the buyer would be entitled to 5¼ points from Clews & Co. As Mr. Wilkins says regarding these premiums:

"It is what one broker who has 500 shares of stock that he is carrying for a customer, and that customer is not prepared to take it up, and he is perfectly willing to pay whatever anybody else who is on the other side of the market will do it for for carrying it for thirty days." (Trans., p. 111.)

All this is Greek unless properly explained, and is something none of us know anything about until it is explained. But it is all in the record, is easily understood, and would have been explained to the United States Circuit Court of Appeals for the Seventh Circuit if that court had asked for an explanation of the transactions. When the transaction is made plain, it is evident that a system by which a July seller may make a new trade with a July buyer, or with somebody substituted by him, providing for delivery in August instead of July, whereby the seller gets interest for carrying the other's trade, has none of the elements of dealing or settling in differences between the contract and market price, and in no way resembles gambling.

But the only evidence the Court of Appeals relied on to

support its claim that this transaction was a gambling contract is the evidence that relates to these charges for carrying over, and is refered to by the court in the following extract from its opinion:

"On its face the correspondence between the complainants and their brokers speaks of 'sales' of Diamond Match stock for July account, of inquiries for the 'difference' demanded to change to August account, and of changes then ordered and reported as made by allowing the 'difference.'" (Trans., p. 158.)

If the learned jurist who rendered the opinion of the Court of Appeals could have dined once or twice with Mr. Wilkins, and talked this matter over at length with him, as did Lord Mansfield dine with his special jurymen at Guild Hall, we fancy he would not have fallen into the error of confusing carrying charges with gambling in differences.

Permit us now to show you by the evidence how Schwartz, Dupee & Co. did carry out their principal's orders to sell for the account, and carry over to the August account. The actual sheet which Jamieson & Co. put into the clearing house on Monday, August 3, representing the trades made Saturday, August 1, is shown opposite page 76 of the transcript. On this blank, under the appropriate headings, and opposite the names of the members of the Stock Exchange who regularly deal in "the accounts," Jamieson & Co. set out in the respective columns the number of shares bought and sold by them under the abbreviated title of the stock dealt in, with the total footing at the bottom of the columns. The balance of these totals shows the number of shares they had bought of particular stock in excess of the number of shares of such stock sold by them, and *vice versa*. You will observe in the sheet referred to, Jamieson & Co. had bought 300

shares of West Chicago Street Railroad, and set the same off in the footing against 8,350 shares of the same stock sold by them. The net balance of 8,050 shares bought is what they held waiting to have the Clearing House clear the same. This the Clearing House would do by bringing Jamieson & Co. together with some other party or parties in the Clearing House who have 8,050 shares sold, so that such party would be the seller to Jamieson & Co., substituted thereby for the nine persons from whom, as appears by said sheet, Jamieson & Co. had bought said shares of West Chicago Street Railway stock. The latter are released when the stock is cleared. This process is repeated daily until delivery day. On the delivery day the ultimate buyer who is to take and pay for the stock of the party who is the seller in the Cleraing House, is first definitely ascertained. On the morning of August 3, 1896, Jamieson & Co., by this sheet, appear to have 1,150 shares of Diamond Match stock, bought of four different persons. These persons appear in the statement made to Jamieson & Co. by the Clearing House August 1, to have been substituted on Saturday, the 1st. (Trans., p. 76.) On that same day, August 1, Schwartz, Dupee & Co. was in the Clearing House short 1,150 shares of Diamond Match to three different parties; to two of them for 1,100 shares by substitution. (Trans., p. 77.) But on August 3 the Clearing House notified Jamieson & Co. that they had substituted Schwartz, Dupee & Co. as the seller of the 1,150 shares of Diamond Match of which Jamieson & Co. were the buyers (Trans., p. 95), and notified Schwartz, Dupee & Co. that they had substituted Jamieson & Co. as buyer of the 1,150 shares the former had sold (Trans., p. 106.), the settling price being $222 for Diamond Match.

Since Schwartz, Dupee & Co. carried over the 700 shares of Diamond Match stock for Clews & Co. on July 25 and 27, respectively, at 229, "Match" had been going down until it struck 222 on August 3. By the delivery day it might have gone down to less than 200. But as explained heretofore every day as the stock went down the buyer had to pay in enough money to make his margin good for the loss in value, and so as to keep in 10 points as margin; while as regularly the seller was permitted to take out his excess of margins. So that, in any event, when the delivery day came Schwartz, Dupee & Co. would have received then, or prior thereto, the full $229. During this decline Schwartz, Dupee & Co. were daily taking out of the Clearing House for Clews & Co. these margins. Exhibits 6 and 7, signed by the respective brokers, show that on August 3d Jamieson & Co. were to pay in $287.50, which Schwartz, Dupee & Co. were to draw for the benefit of their principals who had through them sold 1,150 shares of stock. (Trans., p. 118.) To aid in keeping track of these payments, the member in the Clearing House daily sets out in his sheet, under the column "paid," the amount of money, if any, which he should pay into the Clearing House, the equivalent of which the Clearing House in return permits the broker on the other side of the trade to take out. From Jamieson & Co.'s sheet of August 3, 1896, showing the transaction of August 1, 1896, and opposite page 76 of the transcript, we find Jamieson & Co. paid in to the Clearing House on the morning of August 3, 1896, $6,000. If the stocks had gone up, Jamieson & Co. would have set out on their sheet, under the heading "collect," and opposite the name of the broker with whom they had the contract,

the amount such broker should pay into the Clearing House to meet the amount Jamieson & Co. were entitled to draw out. All this guarantees the keeping up of margins, as required by the rules of the Clearing House and section 1 of article XVI of the constitution, *supra*. If this were not done, then if Diamond Match should go up from 221 to 234, the seller would have inadequate security for the advanced price.

As previously stated, when the member gets his sheet all made out, he daily sends his sheet to the Clearing House, with his check for the amount that he owes the Clearing House, or with a draft for the amount he is entitled to draw out of the Clearing House, as the sheet may show. The manager of the Clearing House, having all the sheets of the various members before him, checks them all up, and ascertains which members of the Exchange have stock of a specified corporation sold for the account in the Clearing House, and sets him off against a member or members whose sheets show that they have a similar total of similar stock bought. The stocks and margins are balanced. Wilkins then makes a summary of everybody's transactions and sends this summary, with a notice of substitution, to each member, in form similar to Exhibit 8. (Trans., p. 113.) This exhibit is the notice the Clearing House sent to Schwartz, Dupee & Co. August 3, 1896. (Trans., p. 106.)

After the Clearing Department of the Chicago Stock Exchange had by this notice notified Schwartz, Dupee &. Co. that Jamieson & Co. were substituted as a buyer for 1,150 shares of Diamond Match sold by Schwartz, Dupee & Co., each of the parties thus substituted sent cards to each other confirming these substitutions. (Trans., p. 118.) The exhibits 6 and 7 are copies of

the cards actually sent on August 3, 1896, by Jamieson & Co. and Schwartz, Dupee & Co. to each other confirming the substitution of Jamieson & Co. as buyers of the 1,150 Match. The afternoon of August 3, 1896, after these cards were exchanged by the parties, they were given to the manager of the Clearing House by the holders; and the sheets that were to be made out August 4th should have confirmed these cards. (Trans., p. 119.)

This was the process which had been carried on up to August 3d, and would have continued until delivery day, when the man found to be substituted in the Clearing House as purchaser would take the stock that was sold for that delivery day, and pay therefor. And out of the money then paid, or what had been drawn out before, Clews & Co., through their brokers, would have received every dollar of the contract price of $229 per share. (See transcript of Wilkins' testimony, pp. 107–114.)

But this is where Judge Grosscup made his mistake of fact, upon which his opinion was predicated. He supposed that Clews & Co., having ordered the sale at $229, would only get $222 per share out of their brokers' contract. But, as we have seen, by reason of their brokers doing just what they were ordered by Clews & Co. to do, to-wit, changing the sale in the July account over to the August account at 229, Clews & Co., through their brokers, were daily, as the stock went down, receiving a part of the $229 per share, and if Jamieson & Co. had not defaulted in the contract, Schwartz, Dupee & Co. would have received for Clews & Co. every dollar of the $229 per share. You will thus observe that from the 27th of July, and during the whole of August, had the Exchange remained open, a contract to deliver 700

shares of the stock should have been in force with some one and the price which Schwartz, Dupee & Co., acting for Clews & Co., were to get for the stock, remained the same. Whatever the price of the stock might be in the Clearing House, on the delivery day, Clews & Co. were to receive and would receive, in any event, at that date, or prior thereto, their selling price of $229 per share. The fact that the party who by this process of substitution was to receive the stock on delivery day may have been an entirely different party from the party who bought the stock when it first went into the account, is just as immaterial as the fact that the amount the last party substituted may have to pay is but $200 per share, while the first party was to pay $229 per share. The substitution of the new party by the Clearing House and the collection from intermediate parties of a part of the purchase price before the date for delivery and payment, is the precise contract which Clews & Co. ordered Schwartz, Dupee & Co. to enter into, when Clews & Co. gave their orders to the latter to sell "for the account." Such was the contract Schwartz, Dupee & Co. did enter into, and such was the contract Jamieson & Co. recognized had been entered into when they received their notice of substitution from the Clearing House on August 3, 1896. This substitution is precisely what section 5 of the rules of the Clearing House provides for. (Trans., p. 126.)

These rules are printed on the back of the Clearing House sheet of Jamieson & Co. for August 3, 1896, so that it is evident that they knew what kind of a contract was being worked out. But Jamieson was president of the Chicago Stock Exchange at that time, and certainly cannot contend that he did not know what he was doing, or what Schwartz, Dupee & Co. were do-

ing, or was not informed of the rules and reglations governing the Stock Exchange. For that matter, as we have shown, Schwartz, Dupee & Co. sent a card, confirming this substitution, to Jamieson & Co., and received back a similar card from Jamieson & Co., confirming the substitution on their part. (Trans., p. 113.)

Hence Jamieson & Co. cannot contend that they were not in privity with Schwartz, Dupee & Co., or Schwartz, Dupee & Co.'s undisclosed principal. There being then no change made by the working of the Clearing House in the amount Schwartz, Dupee & Co. were to get for Clews & Co. for their stock from the amount Clews & Co. ordered them to get, the foundation for Judge Grosscup's opinion crumbles away and the opinion falls to the ground. The answer to Judge Grosscup's question, "How can you claim that Schwartz, Dupee & Co. were authorized by Clews & Co. to accept Jamieson & Co. at $222, when they ordered their stock sold at $229?" is just this: Clews & Co. originally ordered the trades made "for the July account," they then ordered them carried over to August account if anybody would pay their charge for doing so. Using this technical term in their orders, Clews & Co. are bound to intend and contemplate the nescessary result of such orders. The result, accordiag to the rules governing trading in the account in the market in which they placed the orders, was that from the 25th and the 27th of July, when the 500 and 200 shares of stock respectively were turned over to the August account, and up to the 4th of August when the stock exchange closed, Schwartz, Dupee & Co., as the brokers of Clews & Co., were receiving out of the Clearing House, and were bound to receive, the

difference between $229 per share, the selling price, and the Clearing House price of that day. They received prior to the 4th of August, 1896, the difference between 229 and 222 per share, or seven points, which they held for Clews & Co., and upon the 3d of August, 1896, had an enforceable contract with Jamieson & Co., under which, if Jamieson & Co. had lived up to their contract, Clews & Co. would have received $222 per share, plus the $7 already received, or $229 per share, the price at which Schwartz, Dupee & Co. sold their stock.

This question would never have been raised by Judge Grosscup had he thoroughly understood the real nature of the transaction.

While counsel for Jamieson & Co. do not argue in support of the opinion of the Court of Appeals that this was a gambling contract save by *innuendo* (see brief for Jamieson & Co., p. 28 and p. 42), let us call your attention to the rules of the Chicago Stock Exchange, which show that gambling was not intended to result from transactions carried on under the rules.

Section 10 of the Clearing House rules provides that the same rule as to notice, time and place that govern defaults in other contracts made on the Chicago Stock Exchange, and outside of the Clearing House, shall apply to transactions for "the account."

Section 16 provides that in case of any failure of any member to meet his contract all stock bought in or sold out for him as "account" stock shall be settled outside of the Clearing House. (Trans., p. 127.)

Article XVI, Sec. 2, of the by-laws of the exchange

provides for the re-sale or re-purchase of all securities by an officer of the board, when there is a default in keeping up margins (Trans., p. 124), while article XIII provides for similar action where party fails to fulfill his contract when due.

Section 1 of article XV of the constitution provides:

"Any party who fails to comply with his contracts, or becomes insolvent, shall be suspended until he has settled with his creditors." (Trans., p. 122.)

Section 1 of article XVII prohibits any fictitious sales being made under penalty of suspension by the Governing Committee. (Trans., p. 122.)

Article XXIX of the constitution provides:

"Any member of this exchange who is interested in or associated with, or whose office is connected directly or indirectly by wire or other method or contrivance, with any organization, firm or individual engaged in the business of dealing in differences or quotations on the fluctuations in the market price of any commodity or security without a *bona fide* purchase or sale of said commodity or security in a regular market or exchange, shall, on conviction thereof, be deemed to have committed an act detrimental to the interest and welfare of the exchange." (Trans., p. 123.)

Could any clearer intention be manifested on the part of the Stock Exchange that its members should not deal in differences?

As before pointed out, article VII of the by-laws provides for the delivery of all cash securities before 1:30 P. M. (Trans., p. 123); while section 2 of the Clearing House rules provides that deliveries of stocks for "the account" shall be made on the last day of each month. (Trans., p. 125.)

There is no warant then for any suggestion that

the machinery provided for gambling in options or differences. And there is no evidence in the record that either party, much less both parties, intended to gamble when they went into these transactions. Indeed, the Court of Appeals in their opinion admit that. In fact, the whole opinion is predicated upon a woeful misunderstanding of the evidence and of what really took place. Under no circumstances by trading "for the account" could Clews & Co. get more than $229 per share—their contract price—and under no circumstances would they get less than $229 per share. The facts, when properly understood, demonstrate that there is no room in this case to discuss the question of gambling in differences.

It is true that the doors of the Chicago Stock Exchange were closed on the night of the 3rd of August, 1896, on account of the financial crisis in the City of Chicago. Jamieson was president of the board at this time, and probably was as much responsible for such action as anybody. It has not been intimated that he procured it to be done to affect his deals. Surely it will not be contended that Clews & Co. when they gave their orders, or Schwartz, Dupee & Co. when they executed them, intended that the doors of the exchange should be closed so that the transaction could not be carried out on the exchange. There is certainly no evidence that the transaction entered into in July for the second account, or August delivery, was not intended to be carried out just as we have described, or that the results we have described would not have followed. There is certainly no implication in the record that Clews & Co. did not intend to deliver the stock on the August delivery day.

This system of the Clearing House furnished a medium by which the brokers and their customers may transact their business of buying and selling for their principals securities for future delivery, cheaply, safely and expeditiously—safely, in that the Clearing House sees to it at all times that 10 per cent. margin is kept up by both sides to every contract. Cheaply, in that the customer by putting up a ten per cent. margin and a "contango" may thereby buy or sell or carry over stocks for future delivery which he could not otherwise do, without going to the bank and borrowing large sums of money.

After it is explained, it amounts to simply this: Clews & Co., trading "in the account" for August delivery on the Chicago Stock Exchange, sold for a price certain, through their Chicago brokers, who alone have access to the floor of said market, certain stocks to a buying broker of said exchange, who himself, or his substitute, who is ascertained through a system of substitution in the Clearing House, is to accept and pay the price for the stock on delivery day. If the stock does go down, the purchasing broker or his substitute is to daily pay into the Clearing House the amount of the decline, so that on or before the delivery of his stock on the settlement day, the seller gets the price at which he sold his stock. The fact that so far as the exchange is concerned, the deal was carried on in the broker's name, does not affect the right of the principal to enforce the contract he orders made.

In the case at bar, the $10 a share deposit in the Clearing House by both sides to the trade in question was kept good, although the stock went down, and at the closing hour on August 3 there was to the credit of this trade $14,000—$7,000 of which stood on that day to the

credit of Jamieson, and $7,000 stood to the credit of Schwartz, Dupee & Co. This $14,000 is held by these defendants, the Governing Committee of the Chicago Stock Exchange, to secure the performance of the contract represented by the cards and Clearing House sheets and notice of August 3, 1896.

If Clews & Co. should receive back from us the $7,000 they put in, then upon receiving from us the $7,000 Jamieson & Co. put in and $57,400 by decree from Jamieson & Co., with the $91,000 they got at the sale for $130 per share, they would receive just $229 per share for their 700 shares.

But we are not here for the purpose of saying that Clews & Co. did or did not pursue the right remedy after the Stock Exchange closed, and are ultimately entitled to the $14,000, nor are we here for the purpose of saying that ultimately Jamieson & Co. are entitled to the $14,000. But we do insist that we are entitled to have set aside the opinion of the United States Circuit Court of Appeals for the Seventh Circuit declaring these transactions to be gambling. And we do further insist that we are entitled to have set aside the opinion of the Jndge of the United States Circuit Court for the Northern District of Illinois, wherein he declares that there is no privity of contract between the principal who directs his broker to sell stocks for him on the Chicago Stock Exchange for the account, and the ultimate purchaser who, by the rules of the Exchange regulating the trading in the account, invoked by said principal by directing his sales to be so made, is found by said rules to be the purchaser of said stocks.

BRIEF.

I.

THE CONTRACT IS NOT OBNOXIOUS TO SECTIONS 130 AND 131 OF THE CRIMINAL CODE OF ILLINOIS PROHIBITING GAMBLING IN DIFFERENCES.

The construction given by the Illinois courts to this statute must be adopted in considering this Illinois contract.

Melchert v. *American Union Tel. Co.*, 11 Fed. R., 195.
Ward v. *Vosburgh*, 31 Fed. R., 15.

If the contract violates the statute the Stock Exchange is a gambling house *per se*, and all of its brokers are gamblers.

Irwin v. *Williar*, 110 U. S., 499.

But the order to Schwartz, Dupee & Co. at Chicago by their correspondents Clews & Co. in New York, directing them to sell in the Chicago market "*for the account*," commanded them to make the sale in a certain way. The only way known was to make the sale the way sales "for the account" were made at that market, which had to be made according to the rules and usages of the Chicago Stock Exchange governing trading "*for the account.*"

Bibb v. *Allen*, 149 U. S., 481.
Samuels v. *Oliver et al.*, 130 Ill., 79.

Irwin v. *Williar*, *supra*, is, therefore, distinguised, as in that case the principal did not direct the manner in

which the sale was made, and was ignorant of the usages of the market.

In this case the rules and usages of the Chicago Stock Exchange are a part of the contract.

Thorne et al. v. *Prentiss*, 83 Ill., 99.

The presumption as well as the proof is that Jamieson & Co., members of said exchange, contracted with reference to such rules and usages.

Corbett v. *Underwood*, 83 Ill., 324.
Perrin v. *Barker*, 126 Ill., 201.

The language employed by Clews & Co. in their order being technical, the court must look into the usages and customs of the trade for its interpretation.

Lyon & Co. v. *Culbertson & Blair Co.*, 83 Ill., 33–35.

The sale was for future delivery. But time contracts or options even as to time of delivery do not violate the Illinois statutes.

Wolcott v. *Heath*, 78 Ill., 433–437.
White v. *Barber*, 123 U. S., 392.
Pickering v. *Case*, 79 Ill., 330.
Cole et al. v. *Milmine*, 88 Ill., 349.
Pixley et al. v. *Boynton*, 79 Ill., 351.

Sections 130 and 131 of the Criminal Code of Illinois are interpreted in

Pearce v. *Foote*, 113 Ill., 228–234;
Union Nat'l Bk. v. *Carr*, 15 Fed. Rep., 438;
Tenney v. *Foot*, 95 Ill., 99;
Ibid., 4 Bradw. (Ill.), 594,

as applying solely to options to buy or sell with no intention of delivery but with an intention that the transaction shall be settled on differences between contract and market price.

Such contracts are undoubtedly prohibited by the Illinois statute.

Schneider v. *Turner*, 130 Ill., 128.
Pope v. *Hanke*, 155 Ill., 621.

But it must always appear that both parties had the intention that there should be no delivery, but merely a settlement of differences.

Jamieson v. *Wallace*, 167 Ill., 388, 396.
Soby v. *People*, 134 Ill., 71.
Edwards v. *Hoeffinghoff*, 38 Fed., 640.
Irwin v. *Williar*, 110 U. S., 499–508.

The burden is on the party claiming the contract to be illegal to show, not that one, but that *both parties* intended merely a settlement of differences and no delivery.

Pixley et al. v. *Boynton*, 79 Ill., 351.
Scanlan v. *Warren & Co.*, 169 Ill., 142.
Roundtree v. *Smith*, 108 U. S., 268.
Bibb v. *Allen*, 149 U. S., 492.

It is the duty of the court to uphold the contract unless it appears that it is an invalid one.

BREWER, J.—*Bungs* v. *Hornick*, 36 Fed. R., 97.

The cases cited by the Court of Appeals do not apply to the Clearing House system. A contract for stock deliverable in the future is valid though the seller has not

the stock or any means of getting it save to buy it in the market.

Porter v. *Viets*, 11 Fed. Cases, 291.
Irwin v. *Williar*, 110 U. S., 499–508.

The rules of the exchange forbid option trading or fictitious contracts or failures to deliver, and all connections with those engaged in trading in differences, under penalties of suspension or expulsion.

Article 15, section 1; article 17, section 1; and article 29 of the constitution.
Article 4 and article 17 of the by-laws (Transcript, pp. 122–124).
Section 10 of Clearing House rules (Transcript, p. 127).

They show the parties must have contemplated actual delivery.

The fact that margins are put up is of no significance.

Union National Bank v. *Carr*, 15 Fed. R., 438.
Edwards v. *Hoeffinghoff*, 38 Fed R., 635–639.
Hansen v. *Boyd*, 161 U. S., 397, 406.

Nor the fact material that the party defaulting in the putting up of margins may be sold out under the rules.

Bibb v. *Allen*, 149 U. S., 501,
Perin v. *Parker*, 126 Ill., 201, 211.

The substitution of purchasers through the Clearing House is in principle no different from "ringing out" trades. This court and the Illinois courts have invariably held that such substitutions do not make the contract a gambling contract.

Chicago Board of Trade—*Hansen* v. *Boyd*, 161 U. S., 397–407.

Chicago Board of Trade—*Clark* v. *Foss et al.*, 7 Biss., 540.

Chicago Board of Trade—*Ware* v. *Vosburgh*, 31 Fed. R., 15.

Baltimore Exchange—*Irwin* v. *Williar*, 110 U. S., 499.

New Orleans Cotton Exchange—*Lehman* v. *Feld*, 37 Fed. R., 852–855.

II.

CLEWS & CO. HAVING ORDERED THE SALE MADE IN A PARTICULAR WAY, AND IT HAVING BEEN MADE IN THAT WAY, CANNOT NOR CAN THE ULTIMATE PURCHASER THEREBY ASCERTAINED OBJECT THAT THE SELLING PRINCIPAL DID NOT INTEND THIS CONTRACT SHOULD BE CARRIED OUT IN THAT WAY, OR THAT THERE WAS NO PRIVITY BETWEEN THEM.

The trading "*for the account*" has long prevailed on the English Stock Exchange.

Dos Pasos, Stock Brokers, 273 *et seq.*

The Clearing House is but an extension of the ringing-up system, and is adopted from the London and New York Stock Exchanges.

6 Eng. & Am. Ency. Law, p. 166 (2d Ed.).

The London Stock Exchange clearing house explained.

Dos Pasos Stock Brokers, 278, foot note.

The genesis of the stock exchange clearing house and its establishment at Frankfort, Berlin, Hamburg and London, stated in

Political Science Quarterly, June, 1893, Vol. 8, No. 2, p. 252.

The principle of substitution by clearances and the privity of contract resulting therefrom has always been recognized by the Illinois courts.

Oldershaw v. *Knowles*, 4 Bradw. (Ill. App.), 63.

Oldershaw v. *Knowles*, 6 Bradw. (Ill. App.), 325.

Curtis v. *Wright*, 40 Ill. App., 491.

Pardridge v. *Cutler*, 68 Ill. App., 569, 575.

Reibe v. *Hellman*, 69 Ill. App. Ct., 19-22.

And the fact that the ultimate purchaser may have it at a different price matters not so long as the seller gets his price then or theretofore from his predecessor in the clearing house.

Oldershaw v. *Knowles*, 6 Bradw., 325-331.

The "account" or clearing house system is recognized in

Fowler et al v. *N. Y. Gold Exchange Bank*, 67 N. Y., 138.

National City Bank v. *N. Y. Gold Exchange Bank*, 101 N. Y., 595.

This system of trading in the account with substitution of buyers through rules of the Stock Exchange has met with the approval of the highest court of England.

Nickalls v. *Merry*, L. R., E. & I. App. Cases, Vol. 7, p. 530.

Cited with approval in

Irwin v. *Williar*, 110 U. S., 499.

Bibb v. *Allen*, 149 U. S., 490.

To the same effect, *vide*

Blackburn, J., in *Maxted* v. *Payne*, 6 L. R. E. 132, 147, 151, 166–180.

Hodgkinson v. *Kelly*, L. R., 6 Eq., 496.

III.

SPLITTING UP THE SALES WILL NOT DESTROY PRIVITY OF CONTRACT.

On the London Stock Exchange the broker splits up his tickets of purchases or sales and gives his principal split tickets for their amount of purchases or sales.

This does not destroy the privity of contract.

Sheppard v. *Murphy*, 16 W. R., 948.

Maxted v. *Payne*, *supra*.

Anderson & Co v. *Beard*, L. R. 1900, 2 Q. B., 260.

Geissel v. *Bristowe*, L. R., 3 Ch. App., 112.

But it does give the holder of such ticket, who was ignorant of the usage of the exchange, an opportunity to say such was not his contract, as in

Mollett v. *Robinson*, L. R., 7 H. of Lds., 802,

and in

Beckthusen et al. v. *Hamblet*, L. R. (1900), 2 Q. B., 19.

But this principle does not apply where both parties to the contract know the business and intend the very thing to be done that was done.

ARGUMENT.

I.

THE TRANSACTIONS IN QUESTION ARE NOT GAMBLING CONTRACTS.

The lower court in its opinion states:

"We are of opinion, however, that the transaction, as disclosed, clearly falls within the terms of the Illinois statute above cited, as interpreted by decisions of the Supreme Court of the state, and that neither the inquiry last suggested nor the sufficiency of the proof to show a wagering contract under the common law rule require decision to ascertain the invalidity of the contract thus disclosed." (Transcript, 160.)

The statute referred to is set out in the opinion and consists of sections 130-131 of the Criminal Code of Illinois (1st Starr & Curtis Ann. Stat., 2nd Ed., pp. 1295–1298). These sections are as follows:

"SEC. 130. Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any such commodities, shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.

"SEC. 131. All promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages, or other securities or conveyances made, given, granted, drawn or entered into, or executed by any person whatsoever, where the whole or any part of the consideration thereof shall be for any money, property or other valu-

able thing, won by any gaming or playing at cards, dice or other game or games, or * by betting on the side or hands of any person gaming, or by wager or bet upon any race, fight, pastime, sport, lot, chance, casualty, election or unknown or contingent event whatever, * or for the reimbursing or repaying any money or property knowingly lent or advanced at the time or place of such play or bet, to any person or persons so gaming or betting, or that shall, during such play or betting, so play or bet, shall be null and void and of no effect."

That part of section 131 within the stars was added in 1874. The remainder of the section was enacted in 1845 (Rev. Stat., 1845, p. 263, Sec. 1), and said section is almost a literal copy of the statute of 9 Anne, Chap. 14, Pl. 1-2 (1710).

Petillon v. *Hipple*, 90 Ill., 420.

Secton 130, on the contrary, was enacted for the first time in 1874, and since that time has been repeatedly construed by the Supreme Court of the State of Illinois. As the contract in question was made in Illinois, and was to be performed in Illinois, and the lower court declares that it is illegal as being obnoxious to the statutes of Illinois, this court would naturally turn to the decisions of the Illinois courts to ascertain whether the contract falls within the prohibitions of the statute.

Melchert v. *American Union Tel. Co.*, 11 Fed., 195.

If the transaction in question is illegal as being a gambling transaction, every broker who is a party to the transaction engages in gambling, and all may be indicted under the criminal code.

Irwin v. *Williar*, 110 U. S., 499.

Moreover, every broker who has carried on a transaction under the rules of the Stock Exchange has been engaged in gambling. All transactions carried on there under are void, and the Stock Exchange of Chicago is nothing but a gambling hell. Not only must this be true of the Stock Exchange of Chicago, but also of the Board of Trade of Chicago and all its members, to say nothing of the Stock Exchange of New York, the Exchanges of Boston, Philadelphia, New Orleans, St. Louis, Baltimore, and the Exchange in London. For the procedure under which the transaction in question was carried on is substantially similar to that under which property is bought and sold on the exchanges referred to. In London deliveries "for the account" are twice a month, on the New York Stock Exchange and on the Chicago Board of Trade the deliveries are once a month, otherwise the *modus operandi* is the same substantially in all these exchanges.

Not only has the Supreme Court of Illinois frequently considered the statute in question, but this court has often had occasion to consider it, and has always followed the decision of the Supreme Court of Illinois construing said statute.

This court has decided that where a principal sends an order to a broker engaged in an established market or trade for a deal in that trade, he confers authority upon the broker to deal according to any well-established usage in such market or trade, especially when such usage is known to the principal, and is fair in itself, and does not change in any essential particular the contract between the principal and agent, or involves no departure from the instructions of the principal, provided the transaction in which the broker is employed

is legal in its character, and does not violate any rule of law, good morals or public policy.

Bibb v. *Allen*, 149 U. S., 481.

In the earlier case of *Irwin* v. *Williar*, 110 U. S., 499, the judgment of the court below in that case was reversed by this court, upon the point that the court permitted proof of the custom of the Chicago Board of Trade to justify the broker's action, when there was no evidence that the defendant below had knowledge of it. This court held that a custom which provided for exchange and substitution of contracts and payment of differences to effect it, working as it did a complete change in the nature of the seller's rights and obligations, could not be made without his assent, and that assent could be implied only in case of knowledge of the custom which it was claimed authorized it.

In this case Clews & Co. are New York brokers. They were the New York correspondents of Schwartz, Dupee & Co. The latter firm were their correspondents for business done on the Chicago Stock Exchange. They knew that Schwartz, Dupee & Co. in acting as their agents in the sale of stock would transact the business in the Chicago market through that exchange, and in accordance with its rules and regulations, and unless there is evidence of intention on their part to gamble, or the rules of the exchange provide for it, the transaction cannot be called a gambling transaction.

It is the rule in Illinois that all contracts for sale, made on a commercial exchange, by one member thereof with another member, with reference to the by-laws and rules of the exchange, must be construed as if those rules were expressly made part of the contract, and when made at

the exchange will be presumed to have been made with reference to those rules.

Thorne et al. v. *Prentiss*, 83 Ill., 99.

And where a person conversant with the rules and usages of the exchange employs a broker to make purchases for him on the exchange, such persons are presumed to contract with reference to these rules and usages.

Corbett v. *Underwood*, 83 Ill., 324.
Perrin v. *Barker*, 126 Ill., 201.

In *Samuels* v. *Oliver et al.*, 130 Ill., 79, it was said by our Supreme Court:

"It is a general rule that a person dealing at a particular market will be taken to have dealt according to the known and general custom and usage of that market, and if he employs another to act for him in buying and selling at such market, he will be held as intending that the business shall be conducted according to such general usage and custom of such market; and it has been held to be the rule, whether he in fact knows it is the custom or not."

To the same effect, *vide*

Bibb v. *Allen*, 149 U. S., 499.

The language employed in the dispatches by Clews & Co. to Schwartz, Dupree & Co. is highly technical, and without explanation from those familiar with the trade would be meaningless. Having been selected by Clews & Co., they are presumed to know its meaning. As was said by the Supreme Court of Illinois in *Lyon & Co.* v. *Culbertson & Blair Co.*, 83 Ill., 33–35:

"Inasmuch as the great mass of commercial business is transacted by men pressed by their affairs, and who are not in the habit, even if time would permit, of reducing their agreements to writing beyond a mere memorandum,

the courts are compelled to look into the usages of trade or business to learn the real intention of the parties."

When Clews & Co. instructed Schwartz, Dupee & Co. to sell "*for the account*" it instructed the latter to go on the Chicago Stock Exchange and make the "sale under the rules and regulations governing sales *for the account*" on that exchange. There can be no question then but that Clews & Co. adopted and intended to adopt such rules and regulations in making the trade in question. Neither can there can be any question but that Jamieson & Co., members of the exchange, knew what dealing "*for the account*" was, nor any doubt but that they were familiar with the rules governing the same when they went into the Clearing House and consented to be a buyer from the party which the Clearing House coupled them with from day to day as they continued in the Clearing House up to the 3rd of August, 1896. It follows that both sides to the contract made their contract knowingly with reference to the rules governing trading "*for the account*" on the Chicago Stock Exchange and are bound by those rules and the contract made thereunder, unless such contract is illegal.

There can be no claim made in this case that the contract in question violates the Illinois statute against gambling on the ground that it provides for a future delivery. It would not be obnoxious to the Illinois statute did it give to Clews the right to deliver any time during the month of August, instead of providing for delivery on the August delivery day.

As early as 1875, the year after section 130 of the Criminal Code was adopted, the Supreme Court of Illinois, in the case of *Wolcott* v. *Heath*, 78 Ill., 433–437, said:

"It is true, they were time contracts—that is, the seller had all of the month in which to deliver the grain; but the testimony of Wolcott is, they were *bona fide* contracts for the actual purchase of the grain. The only option the seller had was as to the time of delivery. The obligation was to deliver the grain at all events, but it was the seller's privilege or option to deliver it at any time before the closing of business on the last day of the month. Time contracts, made in good faith for the future delivery of grain or any other commodity, are not prohibited by the common law, nor any statute of this state, nor by any policy beneficial to the public welfare. Such a restraint would limit commercial transactions to such a degree as could not but be prejudicial to the best interests of trade."

In *White* v. *Barber*, 123 U. S., 392, this court said, with relation to a case growing out of a transaction on the Chicago Board of Trade:

"A *bona fide* contract for the actual sale of grain, deliverable within a specified future month, the only option with which is the option in the seller to deliver it at any time within such month, is not a gambling contract within the meaning of section 130, chapter 38, of the Revised Statutes of Illinois."

Mr. Justice Blatchford used the following language in delivering the opinion of the court:

"The only question involved in the suit at law is as to the correctness of the charge to the jury in the particulars specially excepted to. The proper construction of the statute of Illinois, Sec. 130 of Chap. 38 of the Revised Statutes, was determined by the Supreme Court of Illinois in *Wolcott* v. *Heath*, 78 Ill., 433, in the passage from the opinion in that case quoted by the Circuit Court in its charge to the jury. According to that construction, the contracts for the sale of No. 2 spring wheat deliverable in July, 1882, made by Barber, were not void as gambling contracts, if they were *bona fide* for the actual sale of grain, and if the only option the seller had was as to the time of delivery, the obligation assumed by Barber being to deliver the grain at all

events, with the option only to deliver it at any time before the close of business on the last day of July, 1882."

The construction given by the Supreme Court of Illinois in the case just cited has never been changed by that court.

In *Pickering* v. *Cease*, 79 Ill., 330, the same language was employed. See, also, *Cole et al.* v. *Milmine*, 88 Ill., 349; *Pixley et al.* v. *Boynton*, 79 Ill., 351.

The true intent of section 130 has often been stated by the Illinois court.

In *Pearce* v. *Foote*, 113 Illinois, 228–234, the court said:

"As was said by this court in *Pixley* v. *Boynton*, 79 Ill., 351, the true idea of an option is what are called, in the peculiar language of the dealers, 'puts' and 'calls.' A 'put' is defined to be the privilege of delivering or not delivering the thing sold, and a 'call' is defined as the privilege of calling for or not calling for the thing bought. Optional contracts, in this sense, are usually settled by adjusting market values, as the party having the option may elect. It is simply a mode adopted for speculating in differences on the market value of grain or other commodities. It must have been in this sense the term 'option' is used in the statute. Such a contract is obviously fictitious, having none of the elements of good faith, as in a contract where both parties are bound, and is defined by statute as a gambling contract."

To same effect *vide Union Natl. Bank* v. *Carr*, 15 Federal R., 438.

In *Tenney et al.* v. *Foote*, 95 Ill., 99, the court approved of a decision by the Appellate Court (*Tenney* v. *Foote*, 4 Bradw., 594), in the following language:

"We may add in conclusion, we see no objection to the law as announced in the opinion adopted by the Ap-

pellate Court, and written by the Circuit judge who was formerly a distinguished member of this court."

The opinion referred to, 4 Bradwell, 594, adopts the opinion of Judge McAllister, Circuit judge, as its own. In that opinion, set out in 4 Bradw., 594, Judge McALLISTER states:

"There has been much difference of opinion as regards the nature of the contract prohibited. It must be, to fall within the prohibition, a contract to have to one's self, or give to another, an option to sell or buy some commodity at a future time. The word 'option' is one much in use on the Chicago Board of Trade, and probably has more than one sense given to it there. Boards of trade for dealing in the principal products of the country are of comparatively recent origin. The system seems to have been borrowed from, and, in its general features, modeled after, the more ancient institution known as the stock exchange, in which many phrases, words and terms of peculiar local meaning came into use; and it will be found that many of these have been carried into and adopted in boards of trade. Now, the word 'option' was in use long ago in the stock exchange, and seems to have acquired a definite meaning. As there used, it meant 'a stipulated privilege to a party in a time contract, of demanding its fulfillment on any day within the specified limit.' Webs. Dic., Ed. 1872, p. 917.

"In practice, on the stock exchange, it was often the intention of the parties that no stock should be delivered, but the transactions settled upon differences. This became common, and the English statute was aimed at its repression because it was, in effect, gambling. Our statute is directed against the same evil, and extends to transactions in grain and other commodities, as well as stocks. So that the word 'option' as used in the statute here, taken with the context, means a mere choice, right or privilege of selling or buying; and it is the contracting for such choice, right or privilege of selling or buying at a future time, any commodity the statute was intended to prohibit, as contradistinguished from an actual sale or purchase, with the intention of delivering and accepting the commodity specified."

It is well settled law in Illinois that all contracts for the purchase and sale of property, with the understanding or agreement of the parties (whether that agreement is expressed on the face of the contract or exists by secret understanding) that the property is not to be delivered or accepted, but the contract satisfied by an adjustment of the difference between the contract and market prices, are mere wagers or gambling contracts and void.

Schneider v. *Turner*, 130 Ill., 128.
Pope v. *Hanke*, 155 Ill., 621.

But in order to invalidate the contract, it must appear that neither party has the intention to deliver the property, and that both parties have the intention of settling the differences only.

Jamieson v. *Wallace*, 167 Ill., 388, 396.
Soby v. *People*, 134 Ill., 71.
Edwards v. *Hoeffinghoff*, 38 Fed., 640.
Irwin v. *Williar*, 110 U. S., 499–508.

And the burden is on the party claiming that the transaction is illegal to show that it is, and if either party contracted in good faith he is entitled to the benefit of his contract, no matter what may have been the secret purpose or intention of the other party.

Pixley et al. v. *Boynton*, 79 Ill., 351.
Scanlan v. *Warren & Co.*, 169 Ill., 142.

This was well illustrated in the case of

Roundtree v. *Smith*, 108 U. S., 268,

a case involving dealings between Roundtree and appellees, who were brokers on the Chicago Board of Trade. The suit was brought in the United States Circuit Court

for the Western District of Wisconsin, and defendants, who interposed a plea of gambling, admitted:

"I could not say that I had any understanding on the subject of the nature and character of the Board of Trade deals, whether the property was to be actually delivered or whether it was to be settled for."

This court held that the lower court was justified in directing the jury to find for the plaintiff.

In *Bibb* v. *Allen*, 141 U. S., 481, this case and others were considered by this court in the following language:

"It is further well settled that the burden of proof is upon the party who seeks to impeach such transaction by showing affirmatively their illegality. *Roundtree* v. *Smith*, 108 U. S., 269; *Dykers* v. *Townsend*, 24 N. Y., 57; *Irwin* . v. *Williar*, 110 U. S., 499, 507, 508. In this latter case the trial court charged the jury that 'the burden of showing that the parties were carrying on a wagering business and were not engaged in legitimate trade or speculation rests upon the defendant. On their face these transactions are legal, and the law does not, in the absence of proof, presume that the parties are gambling. A person may make a contract for the sale of personal property for future delivery which he has not got. Merchants and traders often do this. A contract for the sale of personal property, which the vendor does not own or possess, but expects to obtain by purchase or otherwise, is binding, if an actual transfer of property is contemplated. A transaction which, on its face, is legitimate cannot be held void as a wagering contract by showing that one party only so understood and meant it to be. The proof must go further and show this understanding was mutual—that both parties so understood the transaction. If, however, at the time of entering into a contract for a sale of personal property for future delivery it be contemplated by both parties that at the time fixed for delivery the purchaser shall merely receive or pay the difference between the contract and the market price, the transaction is a wager and nothing

more. * * * It is not sufficient for the defendant to prove that Irwin & Davis never understood that they were to deliver wheat in fulfillment of the sales made for them by the plaintiffs. The presumption is, that the plaintiffs expected Irwin & Davis to execute their contracts, expected them to deliver the amount of grain sold, and before you can find that the sales were gambling transactions and void, you must find from the proof that the plaintiffs knew or had reason to believe that Irwin & Davis contemplated nothing but a wagering transaction, and acted for them accordingly. * * * This court approved that charge as a correct statement of the law upon the subject of what constitutes a wagering contract."

Ibid, 149 U. S., 492.

In an earlier case, *Bangs* v. *Hornick*, 30 Fed. R., 97, counsel contended that it was the absolute duty of the court to denounce the transaction there under consideration unless it clearly appeared that it was a valid and honest one. But says Judge BREWER:

"I think the duty of the court is precisely the reverse, and that it is the duty of the court to uphold it unless it appears that it was an invalid and dishonest one."

Apply these principles to the case at bar.

There is no evidence in this case that Clews & Co. did not intend to deliver the stock that they contracted to sell, or that Jamieson & Co. did not intend to receive and pay for the same. If the plea of gambling had been set up by the defendants Jamieson & Co., such plea must have been overruled, unless it appeared to the satisfaction of the court that the method of procedure adopted by the Chicago Stock Exchange necessarily and of itself constituted gambling. Such opinion could only be predicated upon the rules of the clearing house.

The view of the lower court that the contract was a

gambling contract is, as we have shown, due largely to an entire misconception of what the dispatches referred to.

But the authorities cited by the lower court in no way impugn the clearing house system.

The case of *Irwin* v. *Williar*, 110 U. S., 499–508, cited by the court, holds that a contract for the sale of goods to be delivered at a future date is valid even though the seller has not the goods or any other means of getting them, than to go into the market and buy them.

In the other case cited by the lower court, *Embree* v. *Johnson*, 131 U. S., 336, "the evidence showed," said the court, "that the purchase or delivery of actual cotton was never contemplated, either by the defendant or the said Moody & Jamieson. It was understood between them that the settlement was to be made between said parties by one party paying to the other the difference between the contract price and the market price of said cotton futures, according to the fluctuations of the market."

Ibid., 338.

Bibb v. *Allen*, 149 U. S., 481, cited by the court in its opinion, approved the charge of the lower court to the jury that there was no evidence in the case upon which a verdict for the defendant Bibb (who interposed a plea of gambling) could rest. The contract sued on was not a gambling contract, and was, therefore, valid. This court pointed out that the rules and regulations of the New York Cotton Exchange, which recognized no contracts except for the sale and purchase of cotton to be actually delivered, were germane, competent and relevant in show-

ing that the parties did intend an actual delivery of the cotton in question, saying:

"These rules and regulations imposed upon the seller the obligation to deliver the cotton sold, and upon the purchaser the obligation to receive it, except in certain specified cases, which have no application to the present case."

Article 15, section 1, of the constitution of the Chicago Stock Exchange provides as follows:

"Any member who fails to comply with his contracts, or who becomes insolvent, shall be suspended until he has settled with his creditors."

Article 17 of the same rule provides as follows:

"Fictitious Sales, Bids and Offers. Sec. 1. No fictitious sale shall be made. Any member contravening this section shall, upon conviction, be suspended by the Governing Committee."

Article 29 provides:

"Any member of this Exchange who is interested in, or associated with, or whose office is connected directly or indirectly by wire or other method or contrivance with any organization, firm or individual engaged in the business of dealing in differences or quotations on the fluctuations in the market price of any commodity or security without a bona fide purchase or sale of such commodity or security in a regular market or exchange, shall, on conviction thereof, be deemed to have committed an act or acts detrimental to the interest and welfare of the Exchange."

Article 4 of the by-laws provides:

"No sale of securites shall be made on which a deposit shall be offered as the limit of liability."

Article 17 of the by-laws provides:

"Should any member neglect to fulfill his contract on the day it becomes due, the party or parties contracting with him shall, after giving notice as required by section 2 of the preceding article, employ an officer of the board

to close the same forthwith in the Exchange by purchase or sale as the case may require, unless the price of settlement has been agreed upon by the contracting parties. In case of a failure of a creditor to close the contract as above, the price shall be fixed by the price current at the time such contract ought to have been closed under this rule. In all cases where an officer may be directed to buy or sell securities under this rule, the name of the member defaulting as well as that of the member giving the order shall be announced."

Section 2 of the clearing house rules provides:

"Deliveries of cash, stock or transactions for 'the account' shall be made on the last day of each month"

Section 10 of these rules provides:

"The same rules as to notice, time and place that govern defaults in other contracts shall apply to transactions in 'the account.'" (Trans., 121–127.)

These rules show that the Stock Exchange certainly contemplated delivery; they impose on the seller the obligation to deliver and upon the purchaser the obligation to receive the stock. The transaction itself shows that delivery was intended, and there is no hint in the proof that delivery was not intended by the parties.

Complaint certainly cannot be made that the rules of the Stock Exchange require parties to put up margins as security for the performance of their contracts. If the contract itself is lawful, the putting up of margins to cover losses which may occur from the fluctuations of prices and the final settlement of the transaction according to usages and rules of the exchange are entirely legitimate and proper.

Love, J., in *Union Natl. Bank* v. *Carr*, 15 Fed., 438.

Sage, J., in *Edwards* v. *Hoeffinghoff*, 38 Fed., 635–639.

An instruction to this effect was assumed to be correct by this court in

Hansen v. *Boyd*, 161 United States, 397–406.

The fact that the rules of the exchange allow the party to be sold out if he defaults in his margin in no way affects the validity of the transaction.

In *Bibb* v. *Allen*, *supra*, the cotton advanced beyond the price at which it was sold for delivery, and plaintiffs below, in pursuance of the rules and regulations of the New York Cotton Exchange, called upon Bibb & Co. to put up margins covering the advance in price, and were finally notified that if they did not put up margins they would be sold out. In pursuance of notice Allen & Co., plaintiffs below, went into the market and bought cotton "to cover" that which they had sold for account of Bibb & Co., and to make good their contracts. The court says:

"This they were required to do, both by the terms of their contracts with the parties to whom the cotton had been sold, and by the rules and regulations of the exchange of which they were members. If they had failed 'to cover' or comply with such contracts, the would have been liable to expulsion from the exchange. The cotton which they bought 'to cover' these contracts was purchased at the market price."

Ibid, 149 U. S., 501.

The court there held that the difference between that price and the price of bales previously sold and plaintiff's commissions constituted a claim against Bibb & Co., for which they were entitled to recover.

The court, in the same opinion, proceeds as follows:

"In the case of *Perin* v. *Parker*, 126 Illinois, 201, 211, where the transactions were similar to those in question here, it was said by the Supreme Court of Illinois:

'Parker, as agent for Perin and acting under his orders, sold the corn for Perin, and under the rules of the Board of Trade and the custom of the Chicago market he was personally bound to the purchasers on these contracts of sale. Parker and Perin were dealing with reference to such rules and such custom, with which they were both perfectly familiar. The rules of the Board of Trade provided that on time contracts purchasers should have the right to require of sellers 10 per cent. margins, based upon the contract price of the property bought, and further security, from time to time, to the extent of any advance in the market value above said price. The price of corn had been rapidly advancing since the date of the sales. Parker either had deposited margins upon the contracts or was liable to be called on for the 10 per cent. and the additional margins by the persons to whom he had sold the corn. The evidence does not seem to disclose whether or not the purchasers had either received or called for margins. Even if they had not, yet there was an existing legal right in them to call on Parker for margins, and a legal liability upon the latter, within the next banking hour thereafter, to deposit the margins called for, and also, within that time, deposit with the secretary of the board, or the parties calling for such deposits, duplicate certificates of deposit, signed by the treasurer of the board or an authorized bank.''

Bibb v. *Allen*, 149 U. S., 481–501.

Nor does it support the opinion of the lower court to suggest that the method of substitution of purchasers will in any way invalidate or render illegal the contracts in question.

In *Hansen* v. *Boyd*, 161 U. S., 397–407, a suit was brought by Boyd and others, members of the Board of Trade of Chicago, against Hansen to recover the amount of payments alleged to have been made for account of defendant on account of purchase and sale of certain grain made for account of the defendant in the City of Chi-

cago. Hansen pleaded that the transactions in question were mere wagering contracts. Hansen was generally familiar with the manner in which business was done on the Board of Trade of Chicago, and testified that he supposed the transactions were to be conducted for him on the Board of Trade at Chicago; but claimed that at none of the interviews between himself and the plaintiff's agent was any allusion made to the Board of Trade or the rules of the Board of Trade; and also that it was not his intention to buy or sell any grain, but that he contemplated mere speculation on margins. Hansen became delinquent in furnishing margins, and May wheat was bought on his account at various prices. Later on, the brokers requested his consent to transfer the May to June wheat. Hansen gave no satisfactory response to this inquiry, and later on, in April, plaintiffs sold May wheat on which Mr. Hansen was in default for margins, at a given price, and the loss was charged against Hansen's account. Plaintiffs then bought June wheat and sent a memorandum notice of the May wheat and the purchase of the June wheat to Hansen, together with an account of the loss sustained on the May wheat; and failing to get settlement of the account, in June closed the open contracts on their books, by sale of June delivery wheat, and charging the loss and commissions against Hansen.

Among other instructions given for the plaintiff, and to which the defendant excepted, is the following:

"I might say to you here that if you find from the evidence that any of these contracts had been offset under the rules and regulations as prescribed by the Board of Trade of Chicago, offsets between persons and dealers connected with that board through whom these plaintiffs operated, that is not evidence of their illegality. The

mode of settlement of *bona fide* contracts for the sale of actual wheat does not affect the validity of the contract if the original intention was to purchase, receive, take and deliver the actual wheat at the time specified when the contracts were made."

But the court held that taken into consideration with other instructions offered there was no objection to this instruction. The court did hold, however, that the changing over of the May wheat into June for and on behalf of the defendant, without the consent of Hansen, was unauthorized and to that extent required a *remittitur;* but never suggested or dreamed of holding that "ringing out the trades" by off sets in any way made it a gambling transaction.

No intimation was made in *Irwin* v. *Williar*, *supra*, that "ringing out" the trades made the contract a gambling trade.

This same view of the validity of contracts on the Chicago Board of Trade was expressed at an early date in *Clark* v. *Foss et al.*, 7 Biss., 540.

That was a suit brought in the District Court for the Western District of Wisconsin by the assignee of a bankrupt to set aside certain promissory notes and a mortgage securing the same on the ground that the same were given to secure payments growing out of option contracts on the Chicago Board of Trade, which, it was claimed, were gambling transactions and contrary to the law of the State of Illinois. In that case it appears from the statement of facts by the court the outsider having failed to perform his contract, the brokers performed their contract by going upon the market and purchasing the wheat and corn; that as to 30,000 bushels of corn they made a delivery, and as to 8,000 they closed out

the deal in the manner before indicated by mutual offset and adjustment of differences: that this adjustment of differences is a mere matter of convenience to members of the board, and to their customers; that no person is under the least obligation to settle in that way; that dealers may, and often do, insist upon an actual delivery of the grain, and that settlement frequently saves their customers the cost of insurance and storage; that the object of forming these rings or clearing house is to close out the transactions, and get them off their books, and this is what they call ringing it out; but that it frequently cannot be done in that way, as if, for any reason, one whose assistance is essential to complete the circle prefers an actual delivery, in which case the ring is broken, then each must perform his contract by actual delivery of the grain.

The court held that settling by the "ringing up" process did not make it a gambling contract.

This case, according to the decision of Judge DYER in *Ward* v. *Vosburgh*, 31 Federal, 15, was appealed to the Circuit Court; and in an oral opinion delivered by DRUMMOND, Circuit judge, contracts involved in the foregoing case were sustained, and the decision of the District Court was affirmed.

In *Ward* v. *Vosburgh*, *supra*, Judge DYER pointed out that the Wisconsin statute was broader in its scope than the Illinois statute, and that hence the decision in the Wisconsin court did not apply to an Illinois transaction. Noting that *Barnard* v. *Bachhaus*, 52 Wis., 593, was based upon the Wisconsin statute and should not control an Illinois transaction, Judge DYER said:

"*Clark* v. *Foss*, in many of its prominent features, is on all fours with the case at bar, involving also the va-

lidity of settlements made by the so-called ringing up process, and the contracts out of which that case arose were sustained. * * * In *Clark* v. *Foss*, *supra*, the 'ringing up process' is commented upon, and shown to be in and of itself a legitimate method of adjusting differences in accordance with the rules of business prevailing in the clearing houses of the country.

"In *Williar* v. *Irwin*, *supra*, it was said by Judge GRESHAM in his charge to the jury:

"'The testimony tends to show that a general custom obtained among grain commission merchants in Balti more to the following effect: When one commission merchant, upon the order of a customer, sells to another commission merchant a quantity of grain for future delivery, and it occurs that at some other time before the maturity of the contract the same commission merchant receives an order from another customer to purchase the same *or a larger quantity* of the same kind of grain for the same future delivery, and he executes this second order by making the purchase from the same commission merchant to whom he had made the sale in the other case, that then, in such case, the two commission merchants meet together, and exchange or cancel the contracts as between themselves, adjusting the difference in the prices between the two contracts, and restoring any margins that may have been put up; and from that time forth the first commission merchant holds for the benefit of the customer for whom he sold the order or contract of the purchaser for whom he bought, so that the grain of the selling customer may, when delivered, be turned in on the order or contract of the purchasing customer, and that the commission merchant is held responsible as guarantor to his customer. The evidence also tends to show a custom obtained among commission merchants in Baltimore to the further effect that, though the second transaction may have been had with a different commission merchant from the one with which the first transaction was had, yet where it can be found that a series of contracts are in existence for the sale of like grain for like delivery, so that the seller owes the wheat to the buyer to whom he sold and he to another who owes like wheat for like delivery to the first commission merchant,

that then, in such case, they settle by what they call a 'ring,' that is, they all reciprocally surrender or cancel their contracts, adjust differences in price between themselves, and surrender all margins that have been put up; that in all such cases the commission merchant substitutes the contract of another customer in place of that with the commission merchant whose contract has been canceled or surrendered; and that he guarantees to his customer the performance of the contract originally made in his behalf.'

"This is a very good statement of what the testimony in the case at bar shows transpired between the parties in the transactions here in question; and Judge Gresham held that the customs referred to were founded in commercial convenience, and that they were not in contravention of the law, [illegible] valid.

"The Supreme Court of the United States, in the 140 U. S., 499, in its review of the case above cited reversed the judgment of the court below upon another point, but did not question the correctness of Judge Gresham's ruling upon the validity of the method of business referred to, by which differences were adjusted.

"I must hold, therefore, that for want of adequate proof of an actual intention on the part of both the defendant and the parties with whom the plaintiff as his agent dealt, not to make real sales and purchases, or not to make actual deliveries of property sold and purchased, the contention that the contracts were mere gambling transactions is not established."

Ward v. *Vosburgh*, 31 Fed., 17.

In *Lehman* v. *Feld*, 37 Federal, 852 (Southern District of Mississippi), the practice of ringing out trades on the New Orleans Cotton Exchange was claimed to be evidence of a gambling transaction. Judge Hill, in denying this claim, referred to the rules of said exchange and said:

"These rules and regulations do not require the members purchasing or selling on the floor of the exchange to disclose the names of those for whom they sell

or purchase, but each member or firm making such sales or purchases must guaranty, and become personally bound for, the performance of all contracts so made, as though each was a principal, instead of an agent. The members of the exchange may at stated times, or whenever it is agreed upon between themselves, 'ring out' or 'close out' the said contracts of purchases or sales, by striking a balance, or setting off one contract against another, so as to substitute one for the other; the seller being still prepared and liable to deliver, and the purchaser to receive and pay for the same quantity of cotton, of the grade and at the price stipulated in the original contracts at the time stated for delivery; each being bound to the other upon the guaranty assumed, but on behalf of the unknown principals. These rules and regulations further provide that, to secure the performance of the contracts by each individual or firm so contracting a margin of $1 per bale shall be deposited at the time of the contract, and shall be renewed from time to time, as the rise or fall in price may require, according to the conditions prescribed in these rules and regulations, by which all of the members are governed. * * * The testimony of the plaintiffs is that they had purchased, or obtained upon adjustment of balances, as provided by the rules and regulations, other cotton contracts of the same grade, in the same quantity, to be delivered at the same time, and to be paid for at the same price, and held the same to replace those originally purchased, and it is these substituted contracts which were closed or sold out, resulting in the loss to recover which this suit is brought. * * *

"These rules and regulations recognize the right and duty of the members to settle balances with each other, as before stated, so that the cancellation of the original contracts was not a violation of the duty and obligation of the plaintiffs towards those for whom they dealt."

Ibid., 855.

But as counsel do not here erroneously contend that the transactions in question were gambling contracts, we will spend no further time on this point.

II.

CLEWS & CO. HAVING ORDERED THE SALE MADE IN A PARTICULAR WAY AND IT HAVING BEEN MADE IN THAT WAY, CANNOT, NOR CAN THE ULTIMATE PURCHASER THEREBY ASCERTAINED, OBJECT THAT THEY DID NOT INTEND THE CONTRACT TO BE CARRIED OUT IN THAT WAY OR THAT THERE WAS NO PRIVITY OF CONTRACT BETWEEN THEM.

The cases already cited, which involve the question of "ringing out" of trades on the various exchanges, establish the privity of contract between the seller and the parties substituted by the "ringing out" system as purchaser from his broker. The decisions were necessary, as in those cases the system was attacked on the ground that it was a part of a gambling system, under which contracts were cancelled through mutual set-offs. Before calling your attention to other cases where the contracts, performed by the ringing out of trades, were sought to be set aside or avoided on the ground of like privity, permit us to call your attention to the genesis of the Stock Exchange clearing house.

The reason we call attention to these decisions on ringing up trades is, that they have been thoroughly discussed by the Illinois courts, and universally sustained. But the ringing up of trades is only another name for the clearing house system, and it is fair to assume that a court that will sustain the substitution of a purchaser in the ringing up of trades will sustain the substitution of a purchaser by means of a *clearing house*.

Trading "for the account" is borrowed from the English Stock Exchange, and the system is fully ex-

plained in Dos Pasos on Stock Brokers and Stock Exchanges, page 273 *et seq.*

On the London Stock Exchange by far the most numerous transactions are those "for the account." There the account day, or, as we call it, delivery day, is twice a month. An outgrowth of trading "for the account" or contracting for a future delivery day and the ringing up of trades therein is the Stock Exchange clearing house. The author of the American and English Ency. of Law, 2d Edition, states:

"The utility and convenience of a clearing house system have led to its adoption in commercial transactions other than those between banks. In London there is a railroad clearing house, by means of which distribution is made among the different companies associated in the proceeds of through traffic over the several railways; and there has also been established in the same city a stock exchange clearing house which undertakes to adjust exchanges, consisting of moneys or moneys' demand, or quantities of stock; and in New York there appears to have been organized and operated, by a single banking corporation, a department known as the clearing house for the general clearance of contracts for the purchase and sale of gold."

Ibid, Vol. 6, p. 116.

Dos Pasos, in his work on Stock Brokers, *supra*, in describing the organization of the London Stock Exchange, speaks of the clearing house in the following terms:

"An important extension of the clearing principle was effected by the establishment in 1874 of the London Stock Exchange clearing house, which undertakes to clear, not sums of money, but quantities of stock. As stock brokers settle their transactions only once a fortnight, or in consols once a month, it naturally arises that in the intervals the same broker will usually have bought the same kind of stock for one client and sold it for another.

The very same stock may have passed through several different hands, and the same brokers may have had reciprocal dealings with each other. Instead then of actually making transfers of stock for each transaction and paying by checks which greatly swelled the business of the Lombard street clearing house on settling day, a plan has been arranged according to which each member of the clearing house prepares a statement of the net amount of each stock which he has to receive from or to deliver to each other member The manager of the house, after verifying these accounts, which should balance in the aggregate, directs the debtor members to transfer quantities of stock to the creditor members in such a way as to close all the transactions. * * * A separate clearing is, of course, to be made for each kind of stock. It is found that the quantities actually transferred do not exceed ten per cent. of the whole transactions cleared, and the checks drawn are diminished on settling days as much as ten millions sterling. (Jevon's Money and the Mechanism of Exchanges, pp. 281, 282.)"

Ibid, 278, foot note.

Mr. Alexander D. Noyes, in an article in the *Political Science Quarterly*, Vol. 8, No. 2, page 252, June, 1893, states that the system of a clearing house for stocks was adopted in the New York Stock Exchange in the early months of 1892, but had been in existence elsewhere for at least twenty-five years He says:

"Ordinarily in the first experiments they took the form of so-called 'ringing out' contracts in the same security. By this plan, if A sold B a given amount of one security, and if B had personally sold the same amount to C, the series of trades may be personally adjusted between the three traders, so that the only actual exchange required would be the transfer of the securities from A to C. Of course the number of traders in the series might be extended indefinitely, for the system did not require that the prices at which the trades were made should have been uniform."

The author notes that the first efficient establish-

ment of this kind in Europe was founded in the Handel's kammer at Frankfort, May, 1867; the Berlin Exchange adopted the system in 1869, Hamburg in 1870, Vienna in 1873 and London in 1876. But while the Paris Bourse has never established a regular clearing-house for stocks, the members by voluntary comparison of accounts by brokers' representatives, similar in its general workings to the system of bank clearances, attain the same ends.

Such being the genesis of the clearing house, we observe that it is simply an expansion of the ringing up system. The views of the Illinois courts, therefore, as to the validity and effectiveness of the ringing-up system, are especially important. For if those courts hold that privity of contract exists between C, who by the ringing out of the trades between himself, B and A becomes substituted as buyer from A instead of B, the original buyer, they must hold that it is immaterial whether C is not found until the delivery, so long as B or somebody else is the purchaser during all the intervening period.

The earliest and one of the most instructive of cases is that of *Oldershaw* v. *Knoles*. 4 App., 71. It happily illustrates how unmeaning to a court modern commercial contracts are without proof of customs of the market wherein the contract is to be performed, and how certain, definite and complete they turn out to be when the customs of the local market are fully explained. In that case Oldershaw, the broker on the Chicago Board of Trade, got this dispatch from Knoles, a resident of Jacksonville, Illinois:

"If April lard, ten ninety, buy two fifty."

"The court found this dispatch meant that if lard deliverable at such time in April as either might elect could

be purchased at prices specified, this broker was to buy for him 250 tierces. The broker filled the order and subsequently received two other orders which he filled, buying all told 1,000 tierces. With the last purchase Knoles remitted $700 to be used as margins on the purchase. The price declining rendered this sum too small for margins, and Oldershaw demanded more margins which appellee failed to advance, whereupon appellant sold all the purchases at a considerable loss, for which and his commissions he brought suit."

Upon the trial it was found that after the several purchases of lard by the plaintiffs for the defendants and before the sale of the same by the plaintiffs in the market the plaintiffs as to 750 tierces of lard settled the said purchases with the members of the Board of Trade, from whom the same were made, they in each case realizing a small profit, and made a settlement of the remaining 250 tierces, suffering a small loss.

Appellant, so the opinion states (p. 67), offered to prove that,

"as to the said purchase of lard made on behalf of appellee, the three settlements made prior to February 21st were effected in the following way, and not otherwise: that after making said purchases in the ordinary course of business upon the Board of Trade, it was found that appellants had sales made on account of other parties, customers of appellants, who were entirely responsible, for corresponding amounts of lard of the same delivery to the extent of 750 tierces; that such sales were made to said customers of appellants, either directly to the same parties from whom the purchases were made for appellee, or to some other person or persons who had sold lard to the parties from whom it had been purchased by appellants for appellee; that finding out this condition of facts after said purchases had been made on account of appellee, appellants, in accordance with the general custom and usage obtaining in such matters upon the Board of Trade, made the settlements as to the 750 tierces of lard with the parties from whom they had it purchased; that

by such settlements appellants obtained no interest whatever in the lard bought for appellee, but that the effect of such settlements in each case was merely to discharge the party from whom the lard had been purchased for appellee, by substituting in his stead another entirely responsible person for whose account appellants had the lard sold, leaving appellants responsible to such new party to carry out the contract of purchase, and making such new party liable to appellee, in all respects, to deliver the lard through appellants to him as the party from whom appellants had originally bought the lard for appellee,"

and the appellant also offered to prove that

"for a long time prior to making the settlements in question it had been the general custom and usage upon the Board of Trade to make settlements between the commission merchants upon mutual consent and for their mutual convenience, of the character described by the witnesses, in such cases as that at bar, where it is found that purchases and sales have been made of and to the same party directly or indirectly; that by such settlement the commission merchant substituted for his customer the responsibility of a party for whom he had previously made the sale for that of the party from whom he had made the purchase, and that such substitution was in accordance with the uniform custom and usage of dealers on the Board of Trade in such cases."

This offer was denied, and the Appellate Court of Illinois for the First District said:

"If the evidence offered had been admitted, it would have appeared that by a general and uniform custom upon the Board of Trade settlements of this character were made, and another responsible seller of the same commodity substituted for the one originally furnished to the customer. It must be deemed that this custom was within the meaning and intention of appellants and appellee; that appellee had it in view when he employed appellants to make such purchases for him, and that it entered into and formed a part of the contract between the parties.

The exceptions to the rule authorizing the admission

of evidence of custom or usages of trade are where such custom would vary the terms of an express contract, or contravene an established rule of law. As we have already seen, there was in this case no express contract between the parties, any of the terms of which were repugnant to the custom and usages sought to be proved. Nor are we able to perceive that such custom is in contravention of any established rule of law. It would have been entirely competent for these parties, by *express* agreement, to have provided for a substitution by the appellants of one vendor for another, precisely as was sought to be done in this case. Appellee might have expressly authorized appellant to buy for him the lard in question of one party, and to subsequently exchange such contract for that of any other responsible party they might select, provided only that some contract of a responsible seller in appellee's favor should all the time be kept open so as to secure the delivery of the lard at the time agreed upon. No rule of law would be contravened by such express contract, and precisely the same may be said of a contract implied from the circumstances and the usages of trade. If such provision would be valid in an express contract, it would be equally so in an implied contract."

* * *

In response to the contention that by virtue of the custom, a broker became personally interested in the business of his principal, and thus assumed a position adverse to those for whom he was employed to act, the court said:

"Appellants were engaged in a general business as commission merchants. In such business they were acting not merely for appellee, but doubtless for many other customers as well. The profits derived from the various settlements made by them under the rules of the Board of Trade belonged, not to themselves, but to their customers. A substitution for a purchase made of a third party of a like commodity previously or subsequently sold for another customer, rendering such other customer an account of the differences received or paid on settlement of the original deal, would not, we think, involve the commission merchants in any interest in the business adverse

to their principal. It is true, in all these transactions, they had an interest as nominal principals, and as actual guarantors to those for whom they dealt. Such interest, however, we think was not obnoxious to the principle of law sought to be invoked. * * * By these settlements they obtained no interest whatever in the lard bought for appellee; the effect was, in each case, to discharge the party from whom the lard had been purchased for appellee, by substituting in his stead another responsible vendor, for whose account appellants had already made an equivalent sale of lard, leaving appellants responsible to such new party to carry out the contract of purchase, and making such new party liable in all respects to deliver such lard to appellee, through appellants, in the place of the party from whom appellants had originally made the purchase for appellee."

Ibid., 4 Bradw. (Ills.), 72, 73.

The case went back for a new trial, and upon said trial the trial court allowed evidence of the custom to be introduced, but held the custom was void. Upon appeal to to the Appellate Court, again Judge Bailey, speaking for the court, recited the offer made upon the first trial, that said settlements were made in pursuance of

"a general custom and usage prevailing on the Board of Trade, by which, whenever it was ascertained that a commission merchant had made a contract of purchase, for future delivery, of a given quantity of a particular commodity, and had also made with the same or some other party a contract of sale of a like quantity of the same commodity for the same delivery, and (in case the two contracts were made with different parties) where it appeared that such parties had outstanding similar contracts with each other, either directly or through other dealers, so as to form a chain or ring of contracts for the purchase or sale of a given quantity of a particular commodity for the same delivery, a clearance or settlement was immediately effected between the parties, as between themselves, each paying or receiving the difference between the price fixed in his contract of purchase and that fixed by his contract

of sale; that such clearance or settlement was made by mutual consent of the commission merchants concerned, and for their mutual convenience, and that its effect upon the rights of their customers for whom contracts of sale or purchase for future delivery had been made, was to merely substitute in case of a purchasing customer the contract of another customer for whom the merchant had already made a sale, in place of the contract of the third party from whom he had made the purchase in the first instance, and *vice versa*."

Oldershaw v. *Knoles*, 6 Bradw. (Ill. App.), 325-329.

The court after referring to its former opinion, as concluding the lower court said:

"But even if the validity of the custom or usage established by the evidence was an open question in this case, we are still of opinion that it is valid."

Ibid., 6 Bradw., 331.

You will observe that this "ringing out" is precisely what the clearing house does in the case at bar. Only in the clearing house of the exchange the "ringing out" is done every day until the final delivery day, the contract of sale being in force all the time with some one.

But it was urged in that case, as in this, that there could not be a subsisting contract, because in the ringing out the substituted contract to buy was not identical in price with the contract canceled. In the case at bar it was urged by Jamieson's counsel and by Judge Grosscup of the Circuit Court, that Clews & Co., having authorized a sale at 229, their brokers could make no contract with Jamieson & Co. at 222. (Rec., 94.) But Judge Bailey quickly disposed of that contention, as follows:

"It is urged, however, that even conceding the validity of the custom authorizing a commission merchant, on

making clearances or settlements with other members of the Board of Trade, to substitute with his customer in place of the contract canceled by the settlement another contract, identical in terms, previously made by him for another customer, the contracts sought to be substituted in the present case were not identical in point of price with the contracts canceled, and for that reason could not be so substituted.

"It should be observed that according to the custom in question a commission merchant can be a party to such clearance or settlement only when he appears in one contract as a purchaser and in another as a vendor of the same amount of a particular commodity for the same delivery. If he is dealing as a commission merchant solely and not on his own account, as appears to have been the case with the plaintiffs, he must have made a contract of purchase for one customer, and a contract for the sale of the same amount for the same or some other customer, both for the same delivery. The contract must necessarily be identical in terms in all respects except as to price. But the evidence shows that by the process of settlement this difference, if any exists, is provided for and compensated. For example: if a dealer has made for A, one of his customers, a contract to sell 5,000 bushels of wheat at $1 per bushel, and for B, another customer, a contract to purchase the same amount, at 95 cents per bushel, he collects on the settlement the difference between these two prices, and passes the same to the credit of A, thus reducing the amount. A will, therefore, be entitled to receive for his grain 95 cents per bushel, the precise amount B contracted to pay. The process of settlement merely releases the dealer from his liability to other members of the board, and brings together two of his customers, a seller and a buyer, and makes them parties to one contract."

Ibid., 6 Bradw., 331.

In the case at bar, every day after July 27th, Diamond Match was going down. Hence every day Schwartz, Dupee & Co. were taking out of the clearing house for Clews & Co., from the purchasers substituted, the differ-

ence between the price at which it was sold, or 229, and the clearing house price of that day, so that on August 3d, when the price struck 222, they had collected seven points. As Schwartz, Dupee & Co. were Clews & Co.'s agents, Clews & Co. got the money. In other words, if Jamieson & Co. had paid 222 on August 3d, Clews & Co., by Schwartz, Dupee & Co. taking down these margins, would have 229 in their pockets, the price at which they sold it. Clews & Co. were in no case to get less than 229 and in no case to get more than 229.

In *Curtis* v. *Wright*, 40 Illinois Appellate, 491, the court followed the decision in the Oldershaw case, and held that it was no error for the lower court to refuse to give an instruction to the jury as follows:

"Unless you believe from the evidence that the defendant Curtis had competent knowledge of the rules, regulations and usages of the Board of Trade relating to settlement of contracts by off-sets, and relating to the exchange and substitution of contracts, then Henry Curtis was not and is not bound by such rules, regulations and usages; nor in that case could or did any substituted, exchanged or off-set contract, if any were made by the plaintiff for him, supplant or take the place of any original contracts, if any were made by the plaintiffs for him upon said Board of Trade."

In *Burdridge* v. *Cutler*, 68 Illinois Appellate, 569–575, the court followed the Oldershaw case, and said:

"It was shown that all through these dealings appellant's transactions were closed out by what is known as 'ringing up,' and this, it is said, was improper. 'Ringing up,' it appears, is nothing more or less than the setting-off of one grade against another—a thing which occurs in great cities in mercantile transactions as to 95 per cent. of the entire volume of business; that is to say, in great cities, on purchases and sales of merchandise to the extent of $100,000, in the settlement of the same, upon the average less than

$10,000 in money is actually paid, payments being made through checks upon bank, credit balances being set off against each other. The closing up of transactions on the Board of Trade for the purchase and sale of grain, by setting off one trade against another—in the parlance of the exchange, 'ringing up'—is necessarily no more illegal or improper than is the setting off of credit balances by merchants through checks on banks. True it is, as is urged by appellant, that thereby the identity of the transaction by him had upon the board was lost; that is to say, having purchased a thousand bushels of corn from A, and sold a thousand bushels of corn to B, if each transaction was closed out by a setting off of one against the other, he then had a contract for the delivery of grain with neither. Such result was for his convenience, and entailed upon him no loss, and such method of closing up transactions was a thing of which he was during all these years well aware, without making complaint thereof. *Oldershaw* v. *Knoles*, 4 Ill. App., 63; *Oldershaw* v. *Knoles*, 6 Ill. App., 325."

While this case of *Pardridge* v. *Cutler* was reversed, *Ibid.*, 168 Ill., 504, the reversal was on an entirely different point.

In *Riebe* v. *Hellman*, 69 Ill. App. Ct., 19-22, the court said:

"That in the purchase and sale of this wheat, that there was what is known as 'ringing up' does not make the transactions illegal. *Pardridge* v. *Cutler*, Frst Dist. Ill. Opinion filed February 1, 1897."

As already suggested, the clearing house system does not differ in principle from the system of "ringing up" trades. The statement of facts shows that, under the clearing house system, the buying broker, in effect, agrees that on the "delivery" day he, or some one else ascertained by the clearing house, will receive and pay for the stock sold. The seller agrees to accept such person so ascertained by the clearing house on "delivery" day as the buyer,

and deliver the stock to him. By trading "*for the account*" the buying and selling brokers agree, with every other member of the Stock Exchange who enters into said account, that the manager of the Stock Exchange, as the agent for all the parties, may, each day, clear the trade made in "*the account*," so that upon the expiration of the day following the sale, the stock sold will be deliverable to whoever, by the system, may appear on the sheet as being the purchaser in the clearing house for an equivalent amount of stock. On the next day similar action takes place, and upon the "delivery" day whoever is in the clearing house as the purchaser, for the number of shares contracted to be sold, stands ready and is obliged by the rules of the Stock Exchange to take the shares of stocks from the broker of the seller first spoken of. Margins are kept up in the meantime, and the daily difference between the selling price and the clearing house price is paid in from day to day by the purchaser or the seller, as the stock may decline or rise in value, so that the margins deposited may always be kept intact at $10 per share. The transaction in inself is equivalent to broker A, employed by the outsider to sell, saying to broker B, with whom he makes a contract, and to all other members of the Chicago Stock Exchange who go into the clearing house: "I contract to sell to B and to whoever shall, through my agent, the manager of the clearing house, be substituted upon the 'account' day in the contract to buy shares of stock, equivalent to the shares of stock I have this day contracted to sell B." On the contray, the buying broker says to the selling broker, and to his undisclosed principal, in effect, "I will buy from you so many shares of stock for future delivery, but I retain the right to have my trades cleared in the clearing

house, and upon the 'account' day there will be ascertained by our mutual agent, the manager of the clearing house, myself or some one substituted in my place, who will take the stock so contracted to be bought by me."

The convenience of this system has been remarked upon and approved in *Fowler et al.* v. *New York Gold Exchange Bank*, 67 New York, 138.

The system is described in *National City Bank* v. *New York Gold Exchange Bank*, 101 New York, 595.

The objection that by this substitution of buyers and sellers there is no contract with any one, though specious, is really without merit, as shown in the Illinois cases above referred to.

The same objection was disposed of at an early date by the English courts. A case involving the practice on the London Stock Exchange, quite similar to the account system as carried on in the Chicago Stock Exchange, was considered by the House of Lords in 1875, in *Nickalls* v. *Merry*, L. R. E. & I. App. Cases, Vol. 7, p. 530. According to the then existing rules and usages of the London Stock Exchange, the outsider, through his broker, a member of the exchange, would sell to another broker, also a member of such exchange, shares of stock to be delivered on the account day. The buying broker on the day preceding the account day (usually called the name day), was bound to pass to the selling broker a ticket containing the name of the person or of several persons as the purchaser or purchasers of the said shares, or he might, if he pleased, pass his own name as such purchaser, in which latter case only would he have bound himself to take the shares. Until the name day it was not seen who might stand ultimately, either as purchaser or

seller, or, in other words, who might be the person to transfer or take the shares. Until then the buying broker may have had a great many transactions, both buying and selling, with the same brokers, or with various brokers. On the name day, in the case supposed, if the buying broker, having purchased, had sold again, a ticket containing the name of the person to whom the shares were to be tranferred would have been issued by and passed on from the ultimate buying broker to his seller, and so on through the hands of the other intermediate sellers and buyers of stock, who had dealt in the shares, until it reached the hands of the original selling broker. In this way it sometimes happened that the same ticket passed through the same parties' hands several times in fulfillment of bargains made with other members. The original selling broker was not bound to deliver and transfer shares to the ultimate purchasing broker until the expiration of ten days after the account day. During this interval he might object to the parties named by his buyer, and a committee of the Stock Exchange would decide as to the validity of any such objection, and might require another name to be given, in case they considered it right to do so; but after the lapse of these ten days the selling broker was required to deliver the certificate and transfers of shares to such ultimate purchasing broker.

Speaking of the sale thus made Lord Chelmsford said:

"The contract upon which the question arose, having been made between a broker and a jobber, members of the stock exchange, the usage of that body entered into and to a certain extent determines and governs the nature and effect of the contract. The jobber's (the purchasing broker) contract thorefore is of this description. It is at first a temporary and conditional

contract, but it becomes absolute upon his failure to furnish by the name day the name of a person capable and willing to become the transferee of the shares, so that the seller, by executing a transfer, may make with him a new contract in substitution of the original one with the jobber."

Lord Hatherly said:

"It has been contended on the part of the appellant, and so far justly contended, that the person employing a broker on the Stock Exchange to sell shares in that market, which has been established for the sale of shares, must be taken to conform with the usages and customs which have been established by the parties in that market as among themselves, for the general conduct of their business. It must be supposed to intend that his share shall be sold subject to that condition. So far, well and good. But then, what is the condition? Nobody denies that when a broker sells shares for his principal (who is what is called an 'outsider' and who has employed him to sell the shares) to anybody in the market, there is a good and valid contract made between these parties—that is to say, between the person whose shares are to be sold and the broker who purchases those shares for the vendor's broker. There is a contract, and that contract must be fulfilled. It must be a contract with somebody, and it must be fulfilled, in the first instance, by him who made it—that is to say, by the jobber. But there is open to the jobber, according to the practice and custom of the Stock Exchange (and there it is that the practice of the Stock Exchange comes in) the option of saying, I will give to you the name of a person who has authorized me to give his name instead of my own, and who will perform my contract for me, and when that name is given to you who shall have an opportunity of inquiring into that person's name (ten days I think is the time allowed for such inquiry), and you shall thereby satisfy yourself that the person I name is a person whom I may reasonably propose to you as the person who is to perform the contract which I have with your broker; after which, the contract which I have made will cease, and if he is a person whom it is reasonable for

me to substitute for myself as contracting with you, you shall have the means to satisfy yourself as to the responsibility in point of means to fulfill that engagement which I have taken upon myself. NOW THESE ARE VERY REASONABLE RULES OF THE STOCK EXCHANGE, and nobody can find fault with them, for the very enunciation of them implies that there is a contract to be tranferred, and that there is a person to whom that contract is to be transferred and can be transferred." *Ibid*, p. 546–547.

In the *Nickalls* case, just as in the account system, a contract was entered into by the selling broker with the ultimate buyer, whereby, through the instrumentality of certain other persons, whoever they may be, certain shares were to be sold or bought, and an undertaking was entered into to complete the contract with the person, whoever he might be, who was found under the account system to be the buyer on delivery day. It is immaterial to the seller to whom the shares are to be delivered, as it is to the first buyer, to know from whence they came. The fact that under the English system the name presented on name day must be acceptable to the seller, or, he demurring, to the Stock Exchange committee, does not affect the principle which governs the validity of such a transaction.

The Nickalls case is cited with approval by the Supreme Court of the United States in

Irwin v. *Williar*, 110 U. S., 499, and
Bibb v. *Allen*, 149 U. S., 490.

Maxted v. *Payne*, Law Rep., 6 L. R. Exch., 132, cited in petitioners' brief, is to the same effect.

In that case Blackburn, J., the author of Blackburn on Sales, in speaking of a similar contract, said:

"The undisclosed principals of those two members can,

at law, enforce, and are by law liable for, the contracts made by their agents."

Ibid., 147.

At page 151 he says:

"What difference does it make that the contract was on the Stock Exchange *for the account*. I have no doubt that the plaintiff, now seeking to enforce the contract made on his behalf, must take the contract as it really was, incorporating in it all the usages relative to said contracts, and the questions—what are those usages—what is their extent and what do they mean—are all questions of fact to be ascertained by evidence, but when once they are ascertained the legal effect of the customs upon the contract is a question of law."

He continues:

"There may be a great many intervening members between the two. The ticket, which the member A holds at the name day, bearing on it the name Z as the original issuer and which contains the name and address of one, a member or non-member, or the person into whose name Z intends the shares to be transferred, may have passed through the hands of as many members as might be designated by all the intervening letters of the alphabet, and may have been split a dozen times, and the issuing member may have been a jobber or broker, and the intervening members may have been brokers or jobbers, or both, and the holding member may be either a broker or jobber—still the result will be that the holder of that ticket is brought in contact with the issuer of it, and both must necessarily be members of the Stock Exchange."

He concludes his instructive opinion as follows:

"If the parties entering into this contract were agents (as Sandiman & Co. were for Mexted; Foster & Co. were for Spry), I apprehend their principals, though undisclosed and unknown, would be parties to the contract, and would be subject to the same liability as their agents, and entitled to have the same benefit of the contract. * * * And the convenience of it, in the

present case, may be made clear by supposing that A, holding a ticket issued by Z, which had passed through the hands of members, whom we may designate by the other letters of the alphabet, and that Z, without any valid reason, refused to pay. If there is no privity between A and Z it will be necessary, in order to enforce the performance of Z's duty, for A to sue B, B to sue C, and so on until, ultimately, Y will sue Z before Z, at the expense of twenty-five law suits, be compelled to do his duty by a process very troublesome and costly; whilst if there is a privity between A and Z, it may be enforced by a direct suit between those parties; and this imposes no hardship upon the issuer of the ticket, as it only places him in the same position, relatively, to the holder of it in which he would have stood towards his first vendor, if that vendor had never passed away the ticket but had himself delivered the shares direct. * * * It seems to me that the ultimate novation of the customer must be between the members, and when it takes place it puts the member issuing the ticket under an obligation to fulfill exactly that duty which, before that novation, he would have had to fulfill to the member with whom he had originally contracted." *Ibid.*, pages 166 and 180.

In *Hodgkinson* v. *Kelly*, L. R., 6 Eq., 496, Romilly, M. R., said:

"It is in my opinion an engagement entered into by A on one side and E on the other that, through the instrumentality of certain other persons, whoever they may be, certain shares shall be sold and bought, and they undertake to complete the contract with the person, whoever he may be, who buys on one hand and sells on the other."

To same effect *vide Sheppard* v. *Murphy*, 16 W. R., 94[illegible].

Grissel v. *Bristowe*, L. R., 3. Ch. App., 112.

These authorities conclusively establish a privity of contract between Clews & Co. and Jamieson & Co. The facts in the case at bar leave no room for the application of the doctrine announced by this court in *Irwin* v. *Williar*, 110 U. S., 499, that the usage of the Stock Exchange would not be binding upon an outsider unless he knew of such usage. The custom is certainly binding upon Jamieson & Co. They were members of the exchange. It was certainly known by Clews & Co. and binding upon them, because Clews & Co. expressly directed that this trade should be made "*for the account*," employing the technical terms to describe the transaction, which the rules above referred to provide the machinery for carrying out.

III.

SPLITTING UP THE SALES DID NOT DESTROY PRIVITY OF CONTRACT.

Notwithstanding the distinction between the case of *Irwin* v. *Williar*, *supra*, and the case at bar, counsel for our co-respondents seek to avoid that distinction by citing *Beckhusen et al.* v. *Hamblet*, 2 L. R. (1900), Q. B. Div., 18, and claim the facts in this case are similar to the facts in that case. The principle—but not all that was said in the opinion of the Beckhusen case is similar to the principle announced in *Irwin* v. *Williar*, *supra*. If the case at bar is not distinguishable from the latter, it is unnecessary to cite the English case.

Counsel claim that inasmuch as Clews & Co., on the 27th of July, ordered Schwartz, Dupee & Co. to change 200 of Diamond Match to August account at 2 per cent. or better, they did not authorize their brokers to change

more than 200 shares, and it appearing, as they claim, that on that date Schwartz, Dupee & Co. changed 350 shares, 200 of these could not belong to Clews & Co., that such was not Clews & Co.'s contract, and hence there could be no privity between Clews & Co. and the parties who ultimately became substituted as buyers of said shares. The ground for claiming that Schwartz, Dupee & Co. changed over 350 shares, instead of 200 shares, is based upon the statement of the purchases and sales of Schwartz, Dupee & Co. on behalf of various customers, on July 27th. (Trans., p. 70.)

You will observe from that statement that on that day Schwartz, Dupee & Co. bought 350 shares of Match at 226¾, *for July account*, from broker R. A. Peters, the price at which they telegraphed to Clews & Co. that they had bought 200 Match. (Trans., p. 104.) You will also observe from that statement that they sold 350 of Match "*for the August account*" to R. A. Peters at 229, the price at which they wired Clews & Co. that they had sold the 200 shares. In doing this they followed the method for carrying over July trades to August account, that we have heretofore described, to-wit: by buying back for the July account, and selling for the August account, with the "contango" added, for the current price of the July account. There is no claim that they did not make this change over, and this evidence shows they did. The extra price of the sale for the August account above the purchase for the July account shows that this was a "carry-over" with Peters. The fact that there appears upon the statement of Schwartz, Dupee & Co.'s purchases and sales for July 27, a memorandum that Schwartz, Dupee & Co. had *sold* 350 *for July account* at 226¾ to R. A. Peters, and *bought* 350 shares at

229 "*for the August account*" from R. A. Peters, has nothing to do with the transaction we are now considering. It merely indicates that Schwartz, Dupee & Co. had some buyer in the July account who wanted his account carried over to the August account, and therefore had Schwartz, Dupee & Co. sell 350 for the July account at 226¾ to Peters, and buy back for the August account the same 350 shares from Peters at 229. These figures show that this was a carry over and included the "contango." We explain this in order to eliminate all additional occasion for misunderstanding the facts. But, say counsel for our co-respondents, what right had Schwartz, Dupee & Co., after buying from Peters 350 shares for the July account at 226¾ and selling him said 350 shares for the August account at 229, to claim that they had carried over 200 shares of the transaction for Clews & Co.? Answering this inquiry in the negative, the counsel argue that there must necessarily be a lack of privity. But in making this argument counsel lose sight entirely of the basic principle of *Mollett* v. *Robinson*, L. R., 7 H. of L., 802, the authority for the Beckhusen case.

In *Beckhusen* v. *Hamblet*, *supra*, Kennedy, J., who rendered the judgment, held, upon the authority of *Mollett* v. *Robinson*, *supra*, that where the broker was ordered by his principal to carry over 210 Louisville shares, but bought in his own name from the plaintiffs for that account 360 Louisville shares, thereby lumping the orders of two clients in one contract of purchase in his own name, that that made the contract the broker's contract and not the contract of his clients. Kennedy, J., held that the transaction was one the real nature of which was absolutely different

from the contract his principal authorized him to make, and that, *even though the usage of the Stock Exchange* sanctioned it, unless the principal was acquainted with the usage of the Stock Exchange, which would authorize such departure, the principal could claim that there was no enforcible contract subsisting between him and the other party to the trade.

In this particular Kennedy, J., followed the doctrine of *Mollett* v. *Robinson*, *supra;* but Kennedy, J., said, in addition, that assuming that there was such a usage, and that the principal knew it and contracted with reference to it, "the usage cannot operate, in my judgment, so as to make a man liable upon a contract which is not in point of law his contract. It cannot create contractual rights between parties where none exist, according to legal pr nciples."

Beckhusen et al. v. *Hamblet*, L. R., 2 Q. B., p. 27.

To support this proposition Kennedy cited *Mollett* v. *Robinson*, *supra*, but the opinion he cited was one rendered by one of the judges when the case of *Mollett* v. *Robinson* was in the ~~Common Pleas Court~~ Exchequer (L. R., 7 C. P., p. 109), which opinion was not adopted by the House of Lords. The genesis of *Mollett* v. *Robinson*, *supra*, and what was decided by the House of Lords, is pointed out by Benjamin, in his work on Sales, in the following manner, to-wit:

"Plaintiffs, tallow brokers, were employed by the defendant to purchase fifty tons of tallow in the London market and had like orders from other purchasers. The plaintiffs bought, in their own names, without disclosing their principals, tallow enough for all the orders which they had received and divided it among the princi-

pals that employed them, sending to the defendant a bought note, signed by themselves as 'sworn brokers,' stating fifty tons to have been bought 'for his account,' with quality, price, etc., but no vendor's name given. There was no corresponding sold note delivered to anyone, and no such purchase as was represented in the bought note. Proof was given that the execution of the defendant's order in this manner was in accordance with the usage on the London market, *but the defendant was not aware of the usage*, and refused to accept the tallow when he learned how the business had been conducted. Held in the Common Pleas by Bovill, C. J., and Montague Smith, J., that the defendant was bound to accept; by Willes and Keating J. J., that usage could not be invoked to change the character of the contract, and that the broker could not make himself the principal in the sale, without the latter's consent, and there was no other principal than the plaintiffs. In the Exchequer Chamber, Kelly, C. B., Channel, B., and Blackburn, J., agreed in the opinion with Bovill, C. J., and Smith, J., while Mellor and Hannen, J. J., and Cleasby, B., were of the opposite opinion."

1 Benjamin on Sales, p. 257 (4th Am. Edition).

On appeal to the House of Lords, the judgment of the Court of Common Pleas and of the Exchequer Chamber were reversed. Of the judges summonsed by the House who had not previously given an opinion on the case, Brett and Grove, J. J., dissented from and Amphlett, J., supported the judgments.

In other words, six of the thirteen judges who heard the case at any time held for the plaintiffs and seven against.

What was said by the various judges who passed upon the case in the lower courts cannot be considered to be the adjudication in the case.

Mr. Benjamin states that what was settled by the House of Lords is the following:

"It is, now, therefore, settled law, that when the usage of trade set up is such as goes to alter the intrinsic character of the contract, as, e. g., in *Mollett* v. *Robinson*, by converting the broker employed to buy for his employer, into a principal to sell to him, such usage will not bind a principal who, *ignorant of its existence*, employs a broker to transact business for him on the particular market where it prevai s."

1 Benjamin on Sales, Sec. 240 (4th Am. edition).

In examining the statement of this case in the House of Lords it appears that the facts were found that the principal was ignorant of the custom, and it further appears that a part of the tallow was bought by the broker before, and a part was bought after, the order was received from his principal; that the suit was brought by the broker against the principal on account of the *principal's refusing* to recognize the contract made by the broker, on the ground that it was not the contract that was ordered. In the House of Lords, Lord Chelmsford, in delivering the opinion of the court, said:

"Of course, *if the appellant knew of the existence of the usage*, and chose to employ the respondents to act for him without any restriction upon them, *he might be taken to have authorized* the broker to act for him in conformity to such usage."

Robinson v. *Mollett*, L. R., 7 H. L., 832–836.

In the case of *Irwin* v. *Williar*, *supra*, this court in reviewing that case said that assent could *only* be implied from knowledge of the custom which it is claimed authorized it.

Irwin v. *Williar*, 110 U. S., 516.

Thereby recognizing that assent would be implied if knowledge of the custom was had by the principal.

In the late case of *Anderson* v. *Baird*, L. R. (1900), 2 Q. B., p. 260, where the broker carried over the same number of shares to the next account that they were ordered by their principal to carry, Matthews, J., held that the case of *Beckhusen et al.* v. *Hamblet*, *supra*, did not apply, and said:

"From the evidence before me, I myself, having regard to the course of business, cannot come to any other conclusion than that this contract was binding as between the plaintiff and defendants, and establishes the relation of seller and buyer respectively between them."

These cases all hold that there is privity of contract between the parties who deal in the account and that it is not because of a lack of privity of contract betwen the ultimate purchaser and selling broker's principal, that the contract could be repudiated by either. That it is only when the contract is different from the contract which the principal ordered the broker to enter into that it cannot be enforced; but if the contract is carried out in accordance with the usage which the principal was familiar with, his assent thereto is implied, and he as well as the other party to the trade is bound thereby.

Now, in the case at bar, as we have shown, Clews & Co. are presumed to know what trading "for the account" on the Chicago Stock Exchange is, when they ordered their brokers to so trade. They are presumed to know what "carrying over" on said Stock Exchange is when they ordered the carrying over to be made, the carrying over being but one of the minor details of trading "for the account." It follows, then, that whatever

phase the transaction took in pursuance of the regular trading "for the account" in accordance with the rules of the Chicago Stock Exchange, that very phase Clews & Co. intended their brokers should adopt. It appears from the explanation we have already given of the clearing house system of trading in the account on the Chicago Stock Exchange, that the principal of the broker intends that where the carrying out of the rules so work out, as is frequently the case, that there shall be substitutions in the Clearing House between selling and buying brokers, whereby a broker will be substituted as a purchaser for 200 shares, if you please, out of 350 shares sold by the selling broker, that the principal of said brokers shall have his contracts with such broker for the shares his broker has sold. In other words, it is the custom of the Stock Exchadge, and it is a part of the essence of the Clearing House system, which is the machinery through which the trading "for the account" is done, that the broker may at any time have more shares sold or more shares bought in his trades in the Clearing House than the order of any one given customer, but that such bought or sold shares shall, as between the principal and the other party to the contract, belong to said principal, or be owing from said principal as the case may be, as the substitution of the clearing house may determine. It follows that what Clews & Co. ordered done, that Clews & Co. and every one else are estopped from denying Clews & Co. are responsible for. In this case Jamieson & Co., the other party to the contract, was absolutely familiar with the rules of the clearing house, the senior member of said co-respondent's firm being the president of the Chicago

Stock Exchange at the time, and chairman of its governing committee. They cannot be heard to say that such was not the contract that they entered into. Indeed, our co-respondents have recognized that such was their understanding of their contract. On the day the Chicago Stock Exchange closed, Schwartz, Dupee & Co. were, by substitution, sellers to Jamieson & Co. of 1,150 shares of Diamond Match; but only 450 of this had been ordered by other parties than Clews & Co., Clews & Co. having ordered the sale of the remaining 700. It is obvious that the principals representing the excess over the 700 could not claim that they were entitled to recover damages for the 450 shares out of the 1,150, if Clews could not recover damages for 700 shares sold out of said 1,150. But as appears from the testimony of Mr. Walter Comstock, Schwartz, Dupee & Co. settled with Jamieson & Co. for the 450 shares embraced in the 1,150 shares, which had been substituted on August 31d, and said settlement did not include any settlement as to the 700 shares which Schwartz, Dupee & Co. sold for Clews & Co. (Trans., p. 141.)

In other words, the co-respondent to this suit interpreted this contract, with respect to the 450 shares, in the same manner that the plaintiffs in this case interpret this contract with respect to the remaining 700 shares, *i. e.*, as susceptible of division.

Again, a stipulation was entered into between Judge McConnell, representing our co-respondents, and Judge Davis, representing the plaintiffs, as follows:

"It is admitted that Schwartz, Dupee & Co. have no claim whatever of any kind or character against the $14,000, $7,000 of which was respectively contributed by Schwartz, Dupee & Co. and Jamieson & Co. to the

clearing house of the Chicago Stock Exchange." (Trans., p. 141.)

But it appears that there is $14,000 in our hands, $7,000 of which was contributed by Schwartz, Dupee & Co. When Jamieson & Co., through their counsel, admitted that Schwartz, Dupee & Co. had no claim to that fund, said admission operated either to destroy the fund, or to admit that it belonged to somebody else. Jamieson & Co. do not claim that the $7,000 put up by Schwartz, Dupee & Co. belong to them, and their stipulation is tantamount to admitting that it belongs to Clews & Co. Again, said trust fund was from time to time drawn against and made good by the parties right straight along, as the prices went up and down, Jamieson & Co. contributing $287.50 thereto on the 3rd of August.

Such stipulation, and such action by Jamieson & Co., serve to estop Jamieson & Co. from claiming the transaction was not the transaction of Clews & Co., and unquestionably, if it was the transaction of Clews & Co., then there was not only privity between Jamieson & Co. and Clews & Co., the undisclosed principal of Schwartz, Dupee & Co., but the former must be responsible for such breach of contract, if any, as the evidence shows they made to Clews & Co. alone.

For these reasons we urge that this court reverse the decision of the Court of Appeals, which holds that the transactions in question were gambling transactions, and also the decree of the United States Circuit Court, which holds that in the transactions involved there was no privity between Jamieson & Co. and Clews & Co., and to give such further instructions in regard to the payment

of the trust fund by these respondents as the equities of the case may suggest, and to this court may seem fit.

Respectfully submitted,

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No. 245.

Brf. of e'l Connell v Tenney for Resp.

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Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 245.

HENRY CLEWS et al.,
Petitioners,
vs.
MALCOLM M. JAMIESON et al.,
Respondents.

Certiorari to the Circuit Court of Appeals, Seventh Circuit.

Brief for Respondents Jamieson & Co., in Reply to the Brief on Behalf of the Stock Exchange.

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2537

IN THE

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Brief for Respondents Jamieson & Co., in Reply to the Brief on Behalf of the Stock Exchange.

Since writing and filing our original brief in this case, the counsel for the Governing Committee of the Stock Exchange have prepared and served upon us their brief, which is devoted to an attack upon our side of the case.

The Governing Committee thus seek in this court a reversal of the decree which in their answer they asked the Circuit Court to enter, viz: a dismissal for want of equity. (Trans., p. 27.) This brief, though presented as a respondent's brief, is in reality a brief for the petitioners; and we therefore present this reply to some of the points which it discusses.

I.

THE CLAIM THAT CLEWS & CO. KNEW OF AND ASSENTED TO THE PRACTICE OF THE STOCK EXCHANGE, AS THAT PRACTICE IS CONSTRUED BY OPPOSING COUNSEL.

The decision of the mere question whether Clews & Co. knew, or are presumed to have known, of the rules of the Exchange, does not advance us one step in deciding what those rules are, or what is the effect of their operation. For if the effect of action under those rules did not produce a contract under which Clews & Co. could maintain a bill in equity against Jamieson & Co., then the dismissal of the bill was concededly correct.

The rule being established by this court that customs which work a substantial change in the seller's rights, and transform his contract into something materially different from that which he authorized, do not bind him in the absence of affirmative proof that he actually knew of them when he gave his order, counsel seek to bring this case within that rule.

They admit—at least by necessary implication—that there is no evidence of *actual* knowledge by Clews & Co., either of the rules of the Exchange, or of the remarkable construction of those rules upon which the theory of this case rests. Whether admitted or not, it certainly is true that there is no such evidence; and that it is only by inference or presumption that such knowledge can be acted upon as a fact in the case. This inference is based upon the use by them of the word "account" in their orders to Schwartz, Dupee & Co.

From the cases collated in the briefs in this case it is clear that the word "account" is used in stock exchanges

in England and in this country to describe sales for future delivery, as distinguished from those in which the stock is to be delivered at once. And in the evidence in this case this is the exact meaning given to it by the witness who was called to define it. He says—being asked to interpret the meaning of the dispatch, "Sell 500 Diamond Match at 220 and a half account"—that "It means 500 shares of stock which is to be deilvered and paid for and taken at the end of July," and that a broker in filling the order would make such a sale. (Trans., p. 110.)

Here is the complainant's own translation of their own order, and it is a simple statement of a plain contract. Nothing in the evidence by which the methods of the Clearing House are explained warrants the presumption either that it is an essential part of a sale "for the account" that it should be transformed so greatly and so often, or that Clews & Co. had any intention of entering into transactions so widely different from those which they authorized. If it be assumed that they were willing to deliver the stock to any other than the original purchaser, and to accept him without reference to his responsibility, and to assent to a change in price on having the "difference settled," this does not warrant the presumption that they assented in advance, or gave authority in advance, to the substitution of a contract by which they were personally bound to deliver a much greater number of shares for a much smaller price. Nor does it warrant the presumption that they assented to the entire obliteration of their contract, by their broker so offsetting it that he is left without even a subsituted obligation to deliver stock to anyone.

As an illustration of what it is said they presumptively authorized, look at the sale of 200 shares on July 27th and apply petitioners' theory to it.

For the July account they bought from and sold to R. A. Peters 350 shares at 226¾. *Result nothing; no subsisting contract with anyone.*

For the August account they bought from and sold to Peters 350 shares at 229. Result of these two transactions, nothing; at the end of that day, they were just where they were when the Exchange opened, viz, with 500 shares sold—by substitution—to two other brokers. Can it be *presumed* that Clews & Co. consciously authorized the making and simultaneous cancellation of a sale, without the substitution of anyone who stood as a buyer even to their brokers?

But by the stipulated facts the original contracts which were made for Clews & Co. were not cancelled by the clearing house substitutions, but remained in force. If Clews & Co., either actually or presumptively, assented to any use by their brokers of these contracts in the Clearing House, it was, therefore, to a use which did not destroy their original obligation upon the principals. This is admitted, and the concession destroys the basis upon which the theory of a succession of new contracts to which they were parties is founded. There were no such new contracts to which they were parties. In the nature of things they could not be, at the same time, parties to the old contract, and also to a new contract which was *substituted* for it.

It is said that Clews & Co. are themselves brokers in New York, and, therefore, presumptively familiar with the rules of the Exchange in Chicago. There is no evidence that they are brokers, unless that follows from the bare statement that they are the correspondents of Schwartz, Dupee & Co. But the rule which is applied

here must be one which will also apply to any man who orders a sale "for the account." If there is room for presumption in any such case, as to the details or construction of the contract, there cannot be a presumed intention or authority to change its intrinsic nature.

No argument is presented by counsel for the Stock Exchange which takes into account the admitted fact that the original contracts remain in force as between the principals, and between the principals and the brokers. Their presentation of the case is upon a hypothetical basis which is not sustained by the record.

It is suggested by counsel for the Exchange that added force is given to their contention by the fact that Mr. Jamieson, one of the three partners in the firm of Jamieson & Co., was president of the Exchange at the time of these transactions. And it is said that for this reason the firm "can not be heard to say that such was not the contract that they entered into." (Brief, pp. 95–6.) We confess to some surprise at this suggestion on behalf of a party who professes to seek only a decision sustainng the rules of the Exchange, and a particular construction of contracts made under them. For the suggestion really means that these rules and contracts have a greater effeet against the president and his firm than against other members. So far as the fact is concerned, it is true that Mr. Jamieson was president of the Exchange, and the evidence shows—and shows nothing further—that he did not object to the resolution of the Governing Committee to close the Exchange. (Trans., p. 119–20.) Whether his failure to vote was caused by the fact that presiding officers ordinarily do not vote, or by some other equally good reason, is a question which is both immaterial and unanswered by the evidence in this case. It is clear that nothing that he

could have done, or left undone, in his official capacity would have changed the rules, or affected in any way the terms or the construction of a contract which resulted from the operation of the rules. And to say that because of his position his firm cannot be heard to deny the construction which adverse parties put upon either the rules or the contract, is to take a position which is lightly characterized as untenable.

Of equal dignity with this argument is the claim that Jamieson & Co. "have interpreted this contract in the same manner that the plaintiffs in this case interpret it" (Brief, p. 96), by settling with Schwartz, Dupee & Co. for whatever liability arose with respect to 450 shares of the 1,150 covered by the contract of August 3. All that the evidence shows is that at some time—the witness being unable to state that it was before the commencement of this suit—"Schwartz, Dupee & Co. settled with Jamieson & Co. for the 450 shares of the 1,150 shares which had been substituted on August 3." (Trans., p. 140–1.) Just why the ordinary right of compromising a claim should be denied to Jamieson & Co., or why a settlement with one claimant should admit their liability to another, we have not been able to perceive. Nothing is shown as to the terms of this settlement; and the meagre statement with regard to it shows action consistent rather than inconsistent with our contention. For Jamieson & Co. did not admit their liability to the principal whom Schwartz, Dupee & Co. represented with reference to the 450 shares, nor settle with that principal. On the contrary, they settled with the brokers who alone, upon their contention, were parties to the contract of August 3.

It is obvious, also, that if Schwartz, Dupee & Co. waited for the opening of the Exchange, and then closed out the 450

shares in the manner required by its rules, a different question would be presented as to the liability of Jamieson & Co. And that liability they might compromise, or pay in full without in any way recognizing, even by implication, the correctness of the position now taken by Clews & Co.

Counsel further say that our admission that Schwartz Dupee & Co. have no claim against the $14,000 placed in the Clearing House "estops Jamieson & Co. from claiming the transaction was not the transaction of Clews & Co." (Brief, p. 97.) We might pertinently inquire how such an admission could change the construction of the rules or the contracts made on the exchange, in which questions alone the Exchange professes to be interested. But does the elimination of an interest in Schwartz, Dupee & Co. in the fund concede that Clews & Co. were parties to the contract? The question answers itself. Mr. Comstock's testimony shows that Schwartz, Dupee & Co. have no interest in the fund, except as agents for Clews & Co., to whom they would have to account for it when collected. (Trans., p. 142.)

In this connection counsel also say that this "trust fund was from time to time drawn against and made good by the parties right straight along." (Brief, p. 97.) This statement is repeated in other parts of the brief, as well as in the brief of counsel for petitioners; and upon it is erected the entire fabric of the argument by which they seek to show the validity of "equating" by settlement of differences, and to explain how a sale at $229 is equivalent to a sale at $222. These statements are at variance with the conceded facts. In the first place, the bill itself alleges that the deposit was made when the contract of August 3d for 1,150 shares was entered into. (Trans.,

p. 57.) The answers of the Governing Committee and of Jamieson & Co. expressly state that the deposit was made on August 3d. (Trans., p. 27, 63.) It is thus admitted in the pleadings that this fund was not created until August 3d. How a fund created on the day the Exchange closed could be "drawn against and made good right straight along" we leave to explanation by our adversaries. If money was deposited before that time, there is neither averment of it in the pleadings, nor proof of it in the evidence. Counsel's statement that the rules require such deposit, and therefore it must have been made, can hardly supply the place of evidence of a fact upon which the theory of their argument is based.

So far as the 200-share sale on July 27th is concerned, there clearly was no deposit made on that; for it was offset by a simultaneous purchase, and a deposit, if made, would have been thereby released.

II.

THE EFFECT OF CHANGING OVER THE SALES FROM THE JULY TO THE AUGUST ACCOUNT.

Counsel for the Stock Exchange have devoted a large part of their brief to an explanation of the process of changing over sales from one account, or month, to the next. And upon this explanation, and the various features involved in it, they base much of their argument, both on the question of the legality of the contract and the effect of the substitutions through the Clearing House.

The gist of this explanation is, that "changing over" is accomplished by buying for the July account and selling to the same broker for the August account at an advanced price. As an example of this, and for the purpose of

graphically illustrating the exact procedure, they point out the entries in the Clearing House sheet of Schwartz, Dupee & Co. for July 25th, the day when they "changed over" the 500 shares to the August account. (Trans., p. 67.) That sheet shows four purchases, aggregating 500 shares, from four different brokers at $227 for the July account, and no sales *for that account.* It also shows corresponding sales for the August account to the same brokers at $229, and no *purchases for that account.*

This, counsel say, shows an actual and legitimate transaction, and demonstrates the soundness of their argument. Now whether the explanation is created to fit the figures, or not, is perhaps not material, for the figures are there. But this argument and the explanation which it is intended to sustain must fit all similar cases. And when we look for similar figures and a similar result, on the changing over of the 200 shares, we not only do not find them, but we find figures which destroy the explanation and show that such a contract as petitioners rely on actually did not result.

The "changing over" of the 200 shares was on July 27, and we should expect to find merely a purchase for July—without any off-setting *sale for that account*—and a sale for August—and again without any off-setting purchase *for that account*—to the same broker, of 200 shares. But we do not find this at all. On the contrary, there was no 200-share transaction at all, either in one amount or as the aggregate of several transactions. The only purchases and sales were of 350 shares. The brokers thus included in one sale 200 shares for Clews & Co. and 150 shares for some other client. ((Stipulation of Facts, Trans., p. 77.) It is not pretended that there was any rule or custom of the Exchange warranting this, and under the decision of

Beckhuson v. *Hamblet, supra,* and the general principles of law, that contract did not bind Clews & Co. and could not have been enforced against them. This alone would defeat petitioners; for the creation of this contract, and its subsequent imposition on Jamieson & Co., is absolutely essential to their case.

But we are considering now only this question of "changing over" to the August account. Treating, therefore, for the present, this 350 transaction as representing Clews & Co.'s order, we find this marked difference between it and the 500-share transaction. In the 500-share "change over" there was a purchase of 500 shares for July, and *no sale for that month;* and a sale of 500 to the same brokers for August, and *no purchase for that month.* The purchase for July thus matches the sale for August, and matches nothing else. But in this 200-share—or 350-share—transaction, all is different. There is a purchase from Peters of 350 shares at $226\frac{3}{4}$ for July, *but there is also a sale to him of the same amount at the same price, for the same account.* The July account was thus balanced, and there was nothing to change over to the August account, and to make the basis of an actual transaction. And turning now to the transactions for August on the same sheet, we find a sale of 350 shares to Peters at $229, which counsel say represents the "change over" of Clews & Co.'s sale; but we also find a purchase of the same amount at the same price from Peters, thus cancelling this transaction also. The Clearing House sheet itself enters them as cancellations, and carries forward only the *balance from the preceding day.* (Trans., p. 70.)

Now the proposition which counsel seek to maintain is, that these clearing house deals not only preserved, but created, a succession of contracts on which some definitely

ascertained person became each day liable to Clews & Co. to receive 700 shares of stock, and who could enforce the delivery of that number from them. Their assertion is, that "somebody is the purchaser during all the intervening time" (preceding the account day). (Brief, p. 72.) But here, in the very inception of the transaction on which the suit is based, the contrary of this result is shown. The obligation *even of Schwartz, Dupee & Co.* was not increased beyond the 500-share transaction of the previous day. They did not have contracts with anyone aggregating 700 shares. There is not room for dispute over this fact—or over its legal consequences.

Were these transactions, whose existence was just long enough to record their extinction, "actual sales"?

Counsel, however, say that the purchase of 350 shares for July must not be treated as cancelling the sale for that account, nor the purchase of 350 for August as cancelling the sale for the August account; but the court *must assume* that these remarkable coincidences mean merely that some other buying customer was also "carrying over" on the same day. The complete agreement of amounts, prices, names, etc., would seem to call for some evidence on which to base such a proposition, if a court is to act on it. But if the fact were so, of which there is concededly no evidence, it would not change the result, nor illustrate how 700 shares could be deliverable on contracts calling for only 500.

Let us, however, consider the question from the standpoint of this other customer. He, it will be seen, was, by the statement of counsel, a *buyer* for July, who wished to "change over" to August, and thus be a *buyer* still for that month. (Brief, p. 90.) For him, therefore, counsel

say Schwartz, Dupee & Co. sold for July—thus cancelling his July purchase, and *bought* for August, thus giving him a contract of purchase for that month. But what became of that purchase, and the contract which is supposed to have been made for him, and to have bound some one to deliver to him? Schwartz, Dupee & Co.'s sheet shows that they had, as the result of that day's transactions, *no contracts of purchase at all.* (Trans., p. 70.) Their sheet for the next day shows that they had no contracts of purchase (either original or by substitution.) (Trans., p. 71), and it was not until July 29th, when the stock had dropped to $222¾, that they were buyers at all, and then only for 300 shares for other clients. (Trans., p. 73.) And these 300 shares were more than offset by their sales, so that their clearing house sheet showed them sellers, and sellers only, for 1,100 shares. On no subsequent day did they buy any stock. In other words, these brokers, who are said to have kept their purchasing customers' contract constantly in force by a daily substituted seller, did not even themselves have on or after the day of purchase *any contracts of purchase at all.*

The stipulation of facts show that the sale of 350 shares on July 28th, shown in the sheet of Schwartz, Dupee & Co. for that day, was made for the client for whom the purchase of that number on July 27th was made, and that it was "to close his purchase." (Trans., p. 78.) In view of the conceded fact that his purchase was already off-set by a contemporaneous sale, and that his brokers had, on July 28th, no contract of purchase outstanding, this is interesting on the question of the *actuality* of these transactions. What was there in this more than book-keeping?

These rules and customs of the Exchange must operate equally for the protection of the rights of all who deal on the Exchange. They are not for the exclusive benefit of Clews & Co., and the latter have no more right to claim a substituted contract for their own benefit than any other customer of Schwartz, Dupee & Co., of whose contract or sale the substitution was the resultant. If these transactions did not serve to either keep alive, or to create, whichever it is, the purchase contract of this other customer, if there were any such, then they had no greater efficacy in creating rights in favor of Clews & Co.

As against this theory of unreal transactions, whose invalidity can with difficulty be concealed, we present the admitted fact which makes these Stock Exchange transactions simple, reasonable and valid, *viz.*, that the original contracts remain in force so far as the principals are concerned, and the new substituted contracts impose direct liability only on the brokers.

III.

THE ILLINOIS AND ENGLISH DECISIONS, WHICH ARE CITED TO SUSTAIN THE THEORY THAT VALID CONTRACTS ARE MADE BY THE PROCESS OF SUBSTITUTION.

It is contended that the Illinois decisions sustain the legality and effectiveness of settlements on the Board of Trade by the process of "ringing up," and that this is but another form of doing the work performed by the Clearing House. This argument is mainly directed to the question of gambling or option contracts, but it is claimed that the same reasoning applies to the question of the effect of the cancellations and substitutions shown in this case.

A distinction, clear in itself, and clearly stated by the courts, between the custom involved in those cases and that which is relied upon here, exists in this fact: In all those cases the substitution put in place of the original buyer an actually ascertained person, who had a contract identical in all its terms, except price, the price being settled in money. In this way the identity of the seller's contract was preserved, instead of being, as here, merged with many others, resulting in a contract for a different number of shares, and as often leaving the seller with no contract at all. If the contracts of different sellers are thus kept separate, and the only change is that a new buyer is substituted, who, by a money payment makes up the difference in price, there is no inherent difficulty in *making* such new contracts. But this separation is distinctly recognized as the essential element which renders the scheme legal and possible.

In *Oldershaw* v. *Knowles*, 4 App. Ct., 63, upon which counsel rely, it was said, speaking of the rejection of evidence of the practice:

"If the evidence offered had been admitted it would have appeared that by a general and uniform custom upon the Board of Trade, settlements of this character were made and *another responsible seller of the same commodity substituted for the one originally furnished to the customer.*"

The court further said that by the terms of the offer of evidence, it was to be shown that the broker obtained no interest in the contract, but that the effect of the settlement was merely to discharge the original seller by substituting another responsible seller *for whom the broker had already made an equivalent sale,* making the new seller liable to deliver the lard through the broker in the place of the original seller.

When this case was again before the Appellate Court (6 App. Ct., 325), the court said:

"According to the custom in question, a commission merchant can be a party to such a clearance or settlement *only when he appears in one contract as a purchaser and in another as a vendor of the same amount* of a particular commodity for the same delivery. If he is dealing as a commission merchant solely, and not on his own account, *he must have made a purchase for one customer and a contract of sale for the same amount* for the same or some other customer, both for the same delivery. *The contracts must necessarily be identical in terms in all respects except as to price.*"

No case is cited in which the contracts of all the brokers are mingled together and in which no new purchaser is substituted, who is obliged to take from the seller the number of shares which he has contracted to deliver.

The decision in *Partridge* v. *Cutler*, 68 Applt. Ct., 569, was reversed by the Supreme Court (168 Ill., 504), and therefore can hardly be considered as establishing the law, especially as the Illinois statute provides that decisions of the Appellate Court shall not be binding in other cases.

The case of *Lyon* v. *Culbertson*, 83 Ill., 33, cited by counsel, holds that a rule which provides that on default in putting up margins, the contract might be considered closed at the market price, is illegal, and in condemning it the court said:

"When they, by agreement, dispense with a performance, or at least an offer to perform, then they render the contract obnoxious to the law of contracts. (*Pickering* v. *Case*, 79 Ill., 328.) It is this effort which stamps it as being in the nature of a gaming contract. It is this effort which characterizes the transaction and renders it illegal."

In the English cases and the practice under the rules of the London Stock Exchange, this preservation of the separate identity of the seller's contract is recognized.

The case of *Nickalls* v. *Merry*, 7 L. R. Eng. & Irish Appeals, was a case decided by the House of Lords after the decisions in the two cases of *Maxted* v. *Paine*. In that case the jobber, answering in our case to the buying broker, having re-sold the shares, received from his purchaser and delivered to the seller's broker the name of L. as the ultimate purchaser, and the transfer was made by the seller to L., who paid for the shares. The company being insolvent, M. was compelled to pay assessments on them, the transfer to L. not having been registered. It turned out that L. was an infant, and legally incapable of accepting a transfer of the shares. In a suit by M. against the purchasing jobber on the exchange, it was held that the liability of the latter as the first contracting buyer was not discharged by the mere giving of the name of L., and the acceptance of it by the seller, but that the custom of the Stock Echange required him to present a purchaser actually able to carry out the purchase, and not having done so, he was not discharged. Lord Cairns, in deciding the case, said:

"The whole object (of the custom) being by means of the first contract to obtain a real purchaser of the shares, it would be in the highest degree irrational to suppose that this first contract could be fulfilled, except either by accepting and paying for the shares, or providing some person who would validly contract to do so."

Lord Chelmsford said in his opinion:

"The jobber does not fulfill his contract by merely giving to the selling broker any name as the purchaser of the shares, but only by giving the name of a person who is of ability to contract, and who has consented to become the purchaser. In other words, the jobber is bound to furnish the seller with the means of executing a transfer of the shares to a nominee against whom the obligation to take such transfer can be enforced, and thereby the seller

be relieved from all liability with respect to his shares; and until he has done so, the jobber has not performed his contract. * * * The jobber's contract, therefore, is of this description, it is at first a temporary and conditional contract, but it becomes absolute upon his failure to furnish by the name day the name of a person capable and willing to become the transferee of the shares, so that the seller, by executing a transfer, may make with him a new contract in substitution of the original one with the jobber."

Lord Hatherley in his opinion says, that when the seller's broker has made a contract of sale with a jobber or another broker, there arises a contract which is to be fulfilled in the first instance by the purchaser, but that the custom of the Stock Exchange permits the purchaser to give in substitution of his own name that of another person, who is to be the purchaser. That this same custom gives to the seller the opportunity of satisfying himself of the responsibility of the proposed purchaser, and rejecting him if not satisfactory. He therefore says that this very statement implies that there is a contract which can be transferred, and that there is a person to whom that contract is to be and can be transferred because he has authorized it, and that it is only when this has been done that the original purchaser is discharged.

These opinions of the different judges in this case show very clearly that all base their decisions upon the fact that under the practice on the London Stock Exchange the seller is given the name of the ultimate buyer, and the opportunity of entering into a new contract with him by the exercise of the ordinary right of election, which lies at the foundation of contracts.

Counsel for the Stock Exchange cite the case of *Anderson* v. *Beard*, L. R., 2 Q. B., 260, as if it were inconsistent with

the case of *Beckhuson* v. *Hamblet,* same volume, p. 18, and as if it were inconsistent with our position in this case. The contrary is true, as we understand that decision.

In that case a broker, on an order from the defendant, bought stock from the plaintiffs, and afterwards, upon direction of his principal, "carried over" the trade to the following month *with the plaintiffs.* It will be observed that this carrying over involved no transaction through the Clearing House or through other parties, but was arranged by the *parties to the original transaction itself,* and it thus amounted merely to a modification of the original contract. Before the account day the buyer's broker failed, and the plaintiff, learning that the defendant was the principal, sued him for damages occasioned by his refusal to take the shares, and the court held that he was entitled to recover.

Here, it will be seen that no question was involved of privity of contract between the principal on one side, and either the broker or principal on the other in the case of a substituted contract. The court expressly recognizes the fact that the parties to the original contract were the parties to the new arrangement of "carrying over" to the account, and held that the defendant, as the principal in that contract, was bound by it. Indeed, his liability was not contested; for the question which he raised was as to the measure of his damages, and he paid into court for the plaintiff's benefit the amount of damages, according to the rule, for which he contended.

The decision does not in any way limit the effect of the decision in *Beckhuson* v. *Hamblet.* In that case the court expressly held that if privity of contract existed between the principal and the broker of the other party, the con-

tract could be enforced; and it was upon the absence of such privity of contract that the decision was based, the court holding that "no contractual liability of the defendant to the plaintiffs ever existed in respect to this transaction."

The court further said that it was not necessary, according to the customs of the Stock Exchange, that a broker, in making contracts with other brokers, should even take care to create privity of contract between his client and the person with whom he contracts.

In short, the decision recognizes the fact that in many of the contracts made by brokers, and the transactions between them, they may be so made that although made on behalf of their clients, the latter are not parties to them, and cannot either enforce these contracts nor be held personally liable upon them.

In *Anderson* v. *Beard*, Matthews, J., in his opinion expressly says that he approves the decision of Kennedy, J., in the *Beckhuson* case, upon the question of privity of contract.

In his chapter on the London Stock Exchange, under the head "Relation of Broker to Client," Dos Passos says that in all these transactions the fundamental elements of agency exist, *i. e.*, that the broker makes the contract *for* his client, though his own money or credit may be used in the transaction. Such incidents of the transaction exist by virtue of the rules of the Exchange, and do not affect the ultimate relation which the parties bear to each other." (Dos Passos on Stock Brokers, pp. 280–3.)

He also cites the case of *Robinson* v. *Mollett*, L. R., 7 H. L. Eng. & I. App. Cases, 802. This was the case where the client gave two orders to buy tallow, one for 50 tons

and one for 200 tons, and the brokers notified him that they had done so. They had not, in fact, made special purchases for these amounts, but made contracts for larger amounts, in accordance with a custom of the market. The client having refused to receive the tallow the brokers sued him, and in the lower court recovered judgment. This judgment was reversed by the House of Lords, holding, among other things, that the custom of settling contracts by balancing purchases and sales between themselves amounted to a custom "to convert himself (the broker) from an agent to buy *for* his employer into a principal to sell to him," and that "a custom of trade may control the mode of performance of a contract; it cannot change its intrinsic nature."

Under the title, "Liability of Jobber to Vendor," on the questions arising under the English custom of passing the principal's name on the "name day," he quotes from cases which hold that the buying broker is discharged upon giving a ticket with the name to the ultimate purchaser, where the seller accepts the name and transfers the stock to him. And this is put upon the ground that the seller has an election to reject the proposed ultimate buyer (in which case the original buyer would have to furnish a new name), or to accept him and transfer the shares to him, and that when he adopted the latter course the first buyer was discharged. (Pages 300–1.)

He also refers to the decision in *Maxted* v. *Paine* (L. R., 4 Ex., 203),where the discharge of the first purchaser is expressly placed on the ground that the seller did not object to Goss (the ultimate and insolvent buyer), but executed a transfer to him (p. 303).

In all these English cases great stress is laid upon the

fact that the seller and ultimate buyer come into contact with each other through the medium of the ticket showing the ultimate buyer's name and the acceptance of it by the seller. The cases cited by Dos Passos, in which it has been held that privity of contract exists between the seller and the ultimate buyer, all contain this element, and the decisions seem to be based squarely upon it. He quotes as follows from a case in which a bill was filed by the seller to compel an ultimate purchaser to take shares which he had bought through the vendor's broker:

"The defendant first insists that there is no privity between himself and the plaintiffs, the original vendors. Undoubtedly upon the original transaction there was not; but * * * though the plaintiffs did not in the first instance agree to sell to the defendants, nor the defendants to purchase from the plaintiffs, yet when afterwards *they were brought together, and the defendant agreed to take the transfer and carried away the certificates, he adopted the whole contract and became the purchaser.*" (p. 320.)

Dos Passos states the result of the decisions on the question of the completion of the contract as follows:

"A contract between the vendor and the ultimate purchaser is complete when a ticket containing the name of the purchaser has been delivered *by his authority* to the vendor, and he *has accepted the name*, and indicated the acceptance by receiving the purchase money or in some other definite manner." (p. 232.)

By this method of using a ticket with the name of the buyer and the number of shares stated in it, there is a preservation of the elements of the original contract, sufficient at least for the purposes of making a contract between the parties by the acceptance of the ticket and the transfer of the shares. But this is radically different from holding that there is privity of contract between the seller on one side and the ultimate buying broker on the other, where

there is no ticket or other means of segregating the seller's contract, or the number of shares which he sold, from a general mass, made up as the resultant of a large number of contracts of purchase and sale, and by offsetting purchases against sales without attempting, either by the exchange of tickets or otherwise, to preserve the identity of original contracts, or to provide in any way a particular person who is *to be presented to the seller as his ultimate buyer*. This is the esential part of the English system. And when the buyer's name is thus presented to the seller *he is at liberty to reject him*, showing conclusively that privity of contract does not then exist between them, but is created by his acceptance of his name, and the transfer of the shares to him.

This practice of ultimately bringing the seller and the new buyer together, into an actual contract for the number of shares which the seller was to deliver and the buyer to receive, with liberty to the seller to reject the proposed buyer, makes such an essential difference between that system and the one involved in this clearing house method, that there is hardly room for comparison. It involves no question of cancelling the contracts of the principals, by substituting contracts for a different number of shares, or of mingling together the contracts of different customers.

IV.

THE DECISIONS OF THE CIRCUIT COURT AND THE COURT OF APPEALS.

It is urged by counsel that the decisions of both the lower courts are based upon a failure to understand the facts of the case—that is, to understand the facts as counsel claim

them to be. The alleged error of the Circuit judge is said to be a failure to understand that the difference in price was "equated" by paying the difference in money.

The alleged error of the Court of Appeals is said to be a failure to understand that there was no intention of settling by payment of differences, and that what the court thought was a payment of differences was merely the charge for carrying over the sales from the July to the August account.

The Circuit judge held that while the substitution on August 3rd created a contract between Schwartz, Dupee & Co. and Jamieson & Co., by which "the defendants were under obligation to take of Schwartz, Dupee & Co. during the month 1,150 shares of the stock in question, at $222." He further held that Clews & Co., were not parties to this contract, and that there could be no presumed assent on their part to a contract so widely variant in its terms from that which they had authorized.

Counsel assume that the only variance between the contract which Clews & Co., authorized and the contract of August 3rd was in the price of the stock. And this they say had, up to that time, been equated by payments to and withdrawals from the fund, which, as we have shown, was not deposited until August 3rd. But it was not in price alone that the contract which they authorized differed from that which they now seek to enforce as their own.

In the first place they never authorized one sale of 700 shares, but two separate sales, having no necessary connection with each other. It was their right to have these contracts kept separate; and if, as is said, they were brok-

ers, and themselves represented different customers in these two sales, this was far from being a matter of indifference to them and their clients.

But suppose we treat their sale as one for 700 shares. The contract of August 3rd was for 1,150 shares, and there can be no doubt, and it is not denied that it was an entire contract imposing upon the parties to it an obligation to deliver and receive that number, and not either a greater or less number. The damages for failure to deliver or receive would be measured by 1,150 shares and not by 700 or 500 or 200. If Clews & Co., were parties to that contract they would be personally liable on it to Jamieson & Co. if they failed to deliver the full number called for, and could not relieve themselves by a tender of 700. That the other client or clients of Schwartz, Dupee & Co., who were interested in the 450 shares, would be jointly liable with them, would not lessen their personal liability to the buyer; it would only furnish means of partial indemnity, if they were compelled to pay the full amount. That any one should even contemplete assuming such great and uncontrollable liability surely cannot be believed, much less presumed. The liability would be limited only by the character and extent of his broker's trades and their relation to the trades of all the other brokers.

To hold that Jamieson & Co. were liable to Clews & Co. for the decreased value of the stock after August 3rd, of course carries with it the concession that Clews & Co. would have been liable to them if the price had advanced. If on August 31st, the price had risen to $230 there would have been a profit to Jamieson & Co. of $8 per share on 1,150 shares, viz, $9,200. Could Jamieson & Co. hold

Clews & Co. personally liable for this loss if the stock was not delivered on the account day? To say that they could not is to admit that the contract did not bind Clews & Co. To say that they could is to hold them to a liability so variant from that of the contract which they authorized that it cannot be accepted as the transaction of a business man.

In saying that the Court of Appeals misunderstood the character of the transactions out of which this contract is said to have arisen, counsel forget that the decision is based upon the petitioners' own statement of the contract, which is quoted at length in the opinion. (Trans., p. 159.) In that statement the contract is plainly admitted to be a mere method of following the fluctuations of the market, and taking or paying the profits or losses which those fluctuations produce. And in their paraphrase of the instructions which, under the rules, they say their clients gave to the brokers, counsel conclude with these words which they attribute to Clews & Co. as expressing their *intention* in the transaction:

"For we have carefully studied this matter (*i. e.*, cancellations, substitutions and payment of differences), and we take it that by the process indicated we will be *in* or *out* on the day of delivery precisely *the difference between our original offer, and the then market price.*" (Trans., p. 159.)

This involves nothing relating to carrying over from one account to the next, or the payment of the charge therefor. It is a plain statement that the brokers can keep the contract alive or not as suits their convenience or the exigency of the market, the client concerning himself only with the amount which the difference in price shows he will be "in" or "out' on settlement day.

The theory of the transaction thus stated by counsel, to

which in substance they still adhere, gives to the contract so little permanence and such a fluctuating character as to make it in substance little more than an option contract. The broker is authorized to cancel the sale and substitute another at a higher or a lower figure as he sees fit; to merge it in the contracts of others, and then change this in turn; to offset the sale against a purchase so as to leave neither outstanding as a binding obligation. Taking that as its character the Court of Appeals held it to be within the Illinois statute which makes such contracts illegal whether the parties intend them as gambling devices or not.

This view of the transactions is the result of an attempt to impute to the customer an intention to have the terms of his contract change with the fluctuations of the market, and to become a party to contracts resulting from his broker's dealings for others. All this is obviated by holding, as the stipulation of facts states, that the customers' contracts continue in force as to them, and that the substituted contracts are only between the brokers.

Respectfully submitted,

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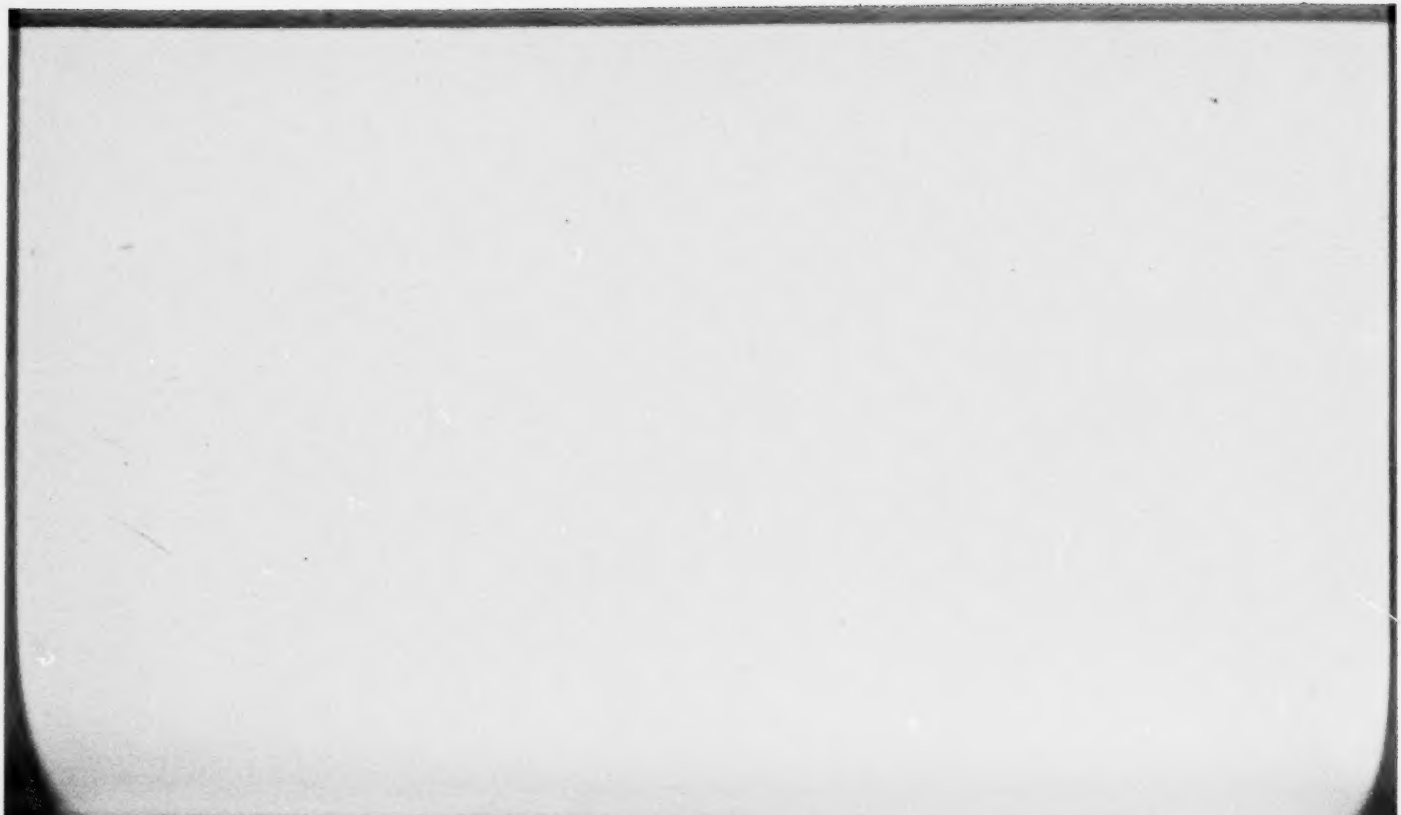
25389



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Supreme Court of the United States.

No. 245.—October Term, 1900.

Henry Clews, Charles M. Foster and James B. Clews, Petitioners, *vs.* Malcolm M. Jamieson, Roland C. Nickerson, Harry F. Billings, et al.	On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[May 27, 1901.]

The petitioners and complainants, being residents of the State and city of New York, commenced this suit in equity in the United States Circuit Court for the Northern District of Illinois against certain of the defendants composing the governing committee of the Chicago Stock Exchange, to recover funds deposited with them, in trust, and also to recover damages against other defendants composing the firm of Jamieson & Company, brokers belonging to the exchange, alleged to have been sustained by the complainants by a violation by those defendants of their contract to purchase and pay for certain stock sold them by the complainants. Still other defendants composed the firm of Schwartz & Company, the brokers who effected the sales of the stock for the complainants, no recovery being sought against them. All of the defendants were residents of the State of Illinois. The Circuit Court after a hearing gave judgment for a dismissal of the bill for want of any privity of contract between complainants and defendants, Jamieson & Company, against whom a money recovery was sought. On appeal the Circuit Court of Appeals for the Seventh Circuit affirmed the judgment of dismissal, and in the opinion discussed only the question whether or not the contract sued on was a gaming one and in violation of the statute of Illinois on that subject, sections 130 and 131 of the Criminal Code hereinafter set forth. It held that the contract violated those sections and that the bill was properly dismissed for want of equity, and it therefore affirmed the decree of dismissal. The complainants thereupon petitioned this court for a writ of certiorari, which was granted, and the case brought here.

No important question arises upon the pleadings, with the exception that it was set up by way of defense that the complainants had an adequate remedy at law, and the facts upon which the defense is rested are sufficiently adverted to in the opinion. The pleadings admit the sales and purchases of stock were all made subject to the rules of the exchange. The case was referred to a master to take testimony and to report the same to the court with his conclusions thereon, and it was subsequently brought to a hearing

upon the master's report and the testimony taken before him and upon a stipulation as to facts, entered into between the parties. The facts reported by the master are, among others, the following:

There has existed in the city of Chicago since the year 1882 a voluntary association known as the Chicago Stock Exchange, composed of brokers having places of business in the vicinity of the exchange, and who are elected to membership therein in accordance with the provisions of the constitution and by-laws; the association is governed by a governing committee composed of the president of the exchange *ex officio*, and twenty-four members, and every member is required to sign the constitution and by-laws, or assent thereto in writing, and obligate himself to abide thereby and by the rules theretofore or thereafter to be adopted.

Article 17 of the constitution provides as follows:

"SEC. 1. No fictitious sales shall be made. Any member contravening this section shall, upon conviction, be suspended by the governing committee.

"SEC. 2. Any member who shall make fictitious or trifling bids or offers or who shall offer to buy or sell any stock or security other than government bonds at a less variation than one-eighth of one per cent. shall, upon conviction, be subject to suspension, or such other penalty as the governing committee shall impose."

Article 29 is as follows:

"Any member of this exchange who is interested in or associated with, or whose office is connected directly or indirectly by wire or other method or contrivance, with any organization, firm or individual engaged in the business of dealing in differences or quotations on the fluctuations in the market price of any commodity or security without a *bona fide* purchase or sale of said commodity or security in a regular market or exchange, shall, on conviction thereof, be deemed to have committed an act or acts detrimental to the interest and welfare of the exchange."

Articles 16 and 17 of the by-laws read as follows:

"ARTICLE XVI.

"SEC. 1. In any contract either party may call at any time during the continuance of the same for a deposit of ten dollars per share upon the par value of the securities bought and sold; and whenever the market price of the securities shall change so as to reduce the margin of said deposit, either way below the ten dollars, either party may call for a deposit sufficient to restore the margin to ten dollars, and this may be repeated as often as the margin may be so reduced. In all cases where deposits are called they shall be made within one banking hour from the time of such call.

"SEC. 2. In case either party shall fail to comply with the demand for a deposit in accordance with the provisions of this article, the party calling, after having given due notice, may report the default to an officer of the exchange, who shall repurchase or resell the security forthwith in the exchange, and any difference that may accrue shall be paid over to the party entitled thereto. The notice above referred to shall be either personal or shall be left in writing at the office of the party to be notified, or

in case he has no office, then by public announcement whenever the exchange may be in session.

* * * * * *

"ARTICLE XVII.

"Should any member neglect to fulfill his contract on the day it becomes due, the party or parties contracting with him shall, after giving notice as required by section 2 of the preceding article, employ an officer of the board to close the same forthwith in the exchange by purchase or sale as the case may require, unless the price of settlement has been agreed upon by the contracting parties. In case of a failure of a creditor to close the contract as above, the price shall be fixed by the price current at the time such contract ought to have been closed under the rule. In all cases where an officer may be directed to buy or sell securities under this rule, the name of the member defaulting, as well as that of the member giving the order, shall be announced. No order for the purchase or sale of securities under this rule shall be executed unless made out in writing over the signature of the party giving the order, who shall state the reason therefor; and it shall be the duty of the officer who executes the order to endorse thereon the name of the purchaser or seller, the price and the hour at which the contract is closed, and hand the same to the secretary of the board, who shall within twenty-four hours ascertain whether the party for whose account the order was given has paid the difference, if any, arising from the transaction; if not, the secretary shall report the default to the president. The duty devolved upon the officers of the exchange under this rule shall be performed without charge. No party shall be permitted to supply offers to buy or sell securities closed for his account under the rule; and when a contract is closed under this rule, any action of the defaulter, direct or indirect, by which the prompt fulfillment of such contract is delayed, hindered or evaded, to the detriment of the other contracting party, shall subject the offending party to suspension for not less than thirty days in the discretion of the governing committee, by a vote of two-thirds of the members present at the meeting. When contracts are closed out under the rule, any member supplying the bid or offer, and not duly receiving or delivering the stock, as the case may be, renders himself liable to prosecution under this article. Should any stock thus sold not be delivered until the next day, the contract shall continue, but the defaulting party shall not be liable to pay such damage as may be assessed by the arbitration committee. The same rules as to notice, time and places that govern defaults in other contracts shall apply to borrowed securities, which on non-delivery or receipt, must be borrowed or loaned in open market, except in case of actual default in receiving or delivering after notice to close the loan; then the same are to be bought or sold, as the case may be, for account of the defaulter in the manner provided in this article."

The rules of the clearing house in regard to buying or selling for "the account" (under which these transactions were had) read as follows:

"*Clearing House Rules.*

"SEC. 1. Under the following regulations transactions may be made for 'the account' in any securities listed for that purpose dealt in at the exchange.

"SEC. 2. Deliveries of cash, stock or transactions for 'the account' shall be made on the last day of each month. Provided, however, should the last day of any month occur on a holiday, or on a day when the exchange is closed for business, then in that case deliveries shall be made on the first business day preceding.

"SEC. 3. All purchases and sales 'for the account' shall be entered upon the blanks furnished by the manager sealed for that purpose, and said blanks properly filled out, balanced, accompanied by a proof-sheet, and signed, must be delivered to said manager before 9.45 A. M. It shall be the duty of the manager to compare and examine the statements rendered, and to report, should any errors be found, to the parties making such errors before 12 M., by written notice, which must be called for at the manager's office. Parties in error must at once proceed to adjust the same and correct their statements. All balances due from members as shown by the statements shall be paid by certified check drawn to the order of the bank designed for that purpose, and delivered to the manager before 10.15 A. M., the same day, except on Saturdays, when the balance must be paid before 9.45 A. M.

"SEC. 4. On balances due to members, as shown by the statements, a draft for the amount, payable to their own order, shall be drawn upon the bank designated for that purpose, and delivered to the manager before 10.20 A. M. (except on Saturday.) The manager shall cause said draft, if correct, to be accepted by said bank and returned to the parties entitled thereto at the manager's office.

"SEC. 5. At or before 9.45 A. M. parties who have not borrowed or loaned their stock balances for 'the account' shall extend said balances on their statements at the closing bid price, designated as short or long, and shall request the manager, in writing, to borrow or loan said stock balances for their account and risk at the closing bid price. Notice that such loans have been made and the names of the parties thereto will be delivered at the manager's office on or before 2 P. M. Loans made by the manager are for one day only, unless renewed between members.

"SEC. 6. Stock balances as shown by the statements rendered for cash settling days must be delivered and paid for at the closing bid price of the previous day, as per manager's notices, before 1.30 P. M. Provided, however, if satisfactory evidence is shown the clearing house committee that the cash stock is on hand in New York or in transit for Chicago, three days' grace will be given the seller to make the delivery with interest, failing in which the clearing house committee shall cause to be purchased for account of delinquent said stock in whichever market in their judgment seems best; and the party so failing to deliver shall be held responsible for all loss or damage arising therefrom, but when a failure to receive or deliver occurs, nothing in these notifications shall be construed to relieve the last contracting parties to the transaction from the liabilities to each other.

"SEC. 7. Whenever a member fails to pay the balance due on his statement by 10.15 A. M. (except on Saturday), the manager shall notify the presiding officer of the exchange, whose duty it shall be to forthwith cause the stock balance, as shown by the statement of the delinquent, to be bought in or sold out under the rules, as the case may be, and assess the party in interest on the statement *pro rata*. In case any member owes an additional amount caused by errors, disputes or assessments, said amount shall be paid within one hour from the time of notification of the same,

otherwise the party will be considered as having failed, and be treated accordingly.

"SEC. 8. Whenever a member is unable to meet his contracts or transactions made for 'the account,' he shall make a statement of his transactions, to be audited that day, and deliver it to the manager or presiding officer of the exchange.

"SEC. 9. The manager or any assistants employed by him in the manager's office are positively prohibited from receiving any securities or currency or any other evidences of value, except the checks and drafts hereinbefore mentioned in these rules.

"SEC. 10. The same rules as to notice, time and place that govern defaults in other contracts shall apply to transactions for 'the account.'

"SEC. 11. Neither the exchange nor any of its members (except those making the errors), the manager or any assistants employed by him, shall be responsible for any errors made in the statements to the manager, but the errors must be settled and adjusted at once between the members making said errors when notified by the manager to do so. The manager shall report any neglect or refusal to comply with these rules to the presiding officer of the exchange.

"SEC. 12. The margin to be deposited on stocks trading in clearing house, selling at $100 or over per share, shall be $10 per share, and on all stocks selling under $100 per share the margin shall be $5 per share.

"SEC. 13. Margins deposited on trades in the clearing house shall be considered as a margin or as a part of same under section 1 of article XVI of the by-laws of the stock exchange. All such margins to be deposited in the clearing house.

"SEC. 14. The clearing of trades and money is not completed until the trades and substitutions are all made and notice posted to that effect by the manager of the clearing house.

"SEC. 15. The broker have the party they may trade with or party received from the clearing house on the substitution of the day before, in case of any failures between the hours the sheets are put in the clearing house, 9.45 A. M., and the time the notice is posted that the substitutions are ready for that day.

"SEC. 16. In the event of the announcement of the failure of any member to meet his contract, all stock bought in on or sold out for him as 'account' stock shall be settled outside of the clearing house, and only such stocks as appear on the substitution sheet of the day of the failure shall be allowed to clear on the clearing house sheet of the following morning.

"SEC. 17. When any member fails to execute any contracts required of him by the clearing house, the margin checks deposited by such member for the protection of other members contracting with him through the clearing house, shall be held first for that special purpose, and after satisfying the claims of such members to the extent of the margin rule of the clearing house, the balance, if any, shall be held for a period not exceeding ten days, as a trust fund for a *pro rata* distribution among other creditors, who are members of the Chicago Stock Exchange."

The master further reported the facts relating to the sales in dispute as follows:

"That such rules and by-laws being in force, complainants, on the 16th day of July, 1896, wired their brokers, Schwartz, Dupee & Company, as follows:

'Sell 500 Diamond Match at 220½ for account;' which was done; that later on the same day said brokers wired complainants as follows:

'Sold 500 Diamond Match at 221½ for the account.'

"That on the 20th day of July, 1896, said brokers received telegram from complainants as follows:

'Sell 200 Diamond Match at 221 for the account at opening of market.'

"That later on the same day said brokers wired complainants as follows:

'Sold 200 Diamond Match 221½ for the account.'

"That on the 25th day of July, 1896, complainants wired said brokers as follows:

'Change the Diamond Match over to August account at 2½ %. If you cannot do it let us know at once.'

"That shortly after on the same day complainants wired said brokers as follows:

'You sent us the difference this morning at 2½; at what difference can you do it now?'

"That later on the same day complainants wired said brokers as follows:

'Change the 500 at 2 cents or better.'

"That afterwards, and about 12 o'clock on the same day, said brokers wired complainants as follows:

'Bought Diamond Match 227 for the account; sold 500, 229 account 2d.'

"That on July 27th complainants wired said brokers as follows:

'Change 200 more Diamond Match 2 % or better.'

"Later on the same day said brokers wired complainants as follows:

'We changed the 200 Match at 2¼ difference. Will give you price later.'

"And shortly afterwards on the same day said brokers wired complainants as follows:

'Bought 200 Match 226¾, account; sold 200 second account 229.'

"That these purchases on July account balanced the sales on July account and left the brokers with sales made for complainants of 700 shares of the stock of the Diamond Match Company for the August account; that on the 3d day of August the clearing department of said stock exchange sent to Schwartz, Dupee & Company, and Jamieson & Company, clearing house sheets as follows:"

(Here follow copies of the sheets; that of Schwartz & Company showed that all trades on their sheet had been settled, with the exceptions therein stated, among which were 1,150 shares of Diamond Match Company's stock at $222, for which Jamieson & Company had been substituted as buyers; the notice to Jamieson & Company from the clearing department contained a like statement, showing that Jamieson & Company had bought 1,150 shares of Diamond Match stock at $222, Schwartz & Company being substituted as sellers.)

The 1,150 shares of Diamond Match stock at $222 were made up in part of 700 shares sold by Schwartz & Company upon August account for the complainants, and the substitution of Jamieson & Company for the parties to whom such 700 shares had been originally sold was made by the clearing department of said stock exchange according to its uniform custom.

The master also found that Jamison & Company had settled with Schwartz & Company for 450 shares of the 1,150 shares referred to between those parties on the clearing house sheet of August 3, 1896, but that such settlement did not include the 700 shares in question in this case.

The master further found as to the manner of making sales "for the account:"

"That the method of doing business on said exchange is as follows: At ten o'clock there is an official call at which the secretary and manager call all the stocks, bonds and securities on the official printed list, and as this call progresses, any member wishing to buy or sell, bids thereon, and the record is made of the transaction; after which there is an irregular call, which closes at half-past one, when the manager of the clearing house announces the clearing house or settlement price for the day, which are the closing prices on the exchange for the respective stocks and securities; that the manager then substitutes trades and sends out cards to all buying or selling on account for the current month, or for the next month; that on the 25th of the month and thereafter until the second day before the end of the month, two calls are made, one for the current month and one for the next ensuing month, and this is done to allow those who wish to do so to change their accounts over to the next month. That this substitution was made by the clearing department by a system somewhat similar to that employed by the clearing house for banks, that is, that where a broker has purchased and sold during the day the same amount of the same kind of stocks or bonds, his account is balanced by the clearing department, and all margins deposited by such broker may be withdrawn; that when sales and purchases are made by different brokers, one buying and the other selling, the same kind of stocks or bonds, a substitution is made by the manager of the clearing department, by which it appears that the broker selling has sold such stock, not to the person to whom it was originally sold, but to a person or persons other than those to whom such sales were originally made, and who originally bought of some one else, and that a broker purchasing stock has purchased from some broker other than the broker from whom he originally purchased the same; for instance, if A had sold 100 shares of stock to X, and B has bought the same amount of the same stock from Y, and X and Y's accounts are balanced by other transactions, the substitution would make it appear that A had sold 100 shares to B, and B had bought 100 shares from A, and the names of the parties with whom the original transactions had actually been made by A and B would not appear on the clearing house sheet; that in the transactions on said exchange it is then customary for the parties thus substituted and brought into the relation of buyer and seller with each other by the manager, to assent to the new relations thus formed, and to confirm the transactions as thus adjusted by the manager, and to put up the margins required by the rules, unless margins are already on deposit in the exchange, in which cases they are transferred by the manager to the new account.

"IV. That being advised of the substitution on account, as aforesaid, said Schwartz, Dupee & Company, and said Jamieson & Company on said 3d day of August, 1896, exchanged trading cards with each other, on which appears the following:

'CHICAGO, *Aug.* 3, 1896.

'M. Jamieson & Co.:

'We hereby confirm sales made by us for the account to-day under the rules of the Chicago Stock Exchange, also substitution trades.

Am't.	Kind of property.	Price.
	Substitution trades—Sold.	
1,150	Match	222
	Difference { Collect	
	{ Pay	287 50

(Signed) SCHWARTZ, B. & Co.'

'CHICAGO, *Aug.* 3, 1896.

'M. Schwartz:

'We hereby confirm purchases made by us for the account to-day, under the rules of the Chicago Stock Exchange, also substitution trades.

Am't.	Kind of property.	Price.
	Substitution trades—Bought.	
1,150	D. Match	222
	Difference { Collect	
	{ Pay	287 50

(Signed) JAMIESON & Co.'

"That these cards were handed by the parties receiving them to the clearing house department, so that it appeared at the close of business on said 3d day of August, by the clearing sheet, that Schwartz, Dupee & Company had sold to Jamieson & Company on account, for August, 1,150 shares of the stock of the Diamond Match Company, 700 shares of which are the stock in controversy in this case, delivery of which under rule 2 of the clearing house was to be made on the last day of August, 1896; that Schwartz, Dupee & Company and Jamieson & Company each deposited with the said clearing house, seven thousand dollars, as margins on said 700 shares of stock, which amount is still held by the said stock exchange, in trust.

"V. That on the 3d day of August, 1896, the governing committee, of which defendant Jamieson was then *ex officio* president, by virtue of his being then president of said exchange, held a meeting at which the following resolution was adopted, the said defendant Jamieson voting in favor of its adoption:

'*Resolved*, That the exchange adjourn on Tuesday morning, the 4th instant, and remain closed pending further action by this committee.'

"That pursuant to said action, said exchange did not open on said August 4, or thereafter, until the 5th day of November, 1896.

"VI. That on the 31st day of August, 1896, Schwartz, Dupee & Company tendered to Jamieson & Company ten certificates of the stock of the Diamond Match Company for one hundred shares each, and three like certificates 50 shares each, making 1,150 shares of said stock, which said Jamieson & Company examined and refused to receive."

On September 9, 1896, Schwartz & Company wrote the following letter to Jamieson & Company:

"CHICAGO, *September* 9, 1896.

"Messrs. Jamieson & Co., No. 187 Dearborn street, Chicago, Illinois.

"Dear Sirs: On August 31, 1896, we tendered you seven hundred (700) shares of Diamond Match stock in settlement of sales made by us. The

sales made were 500 shares July 25th, and 200 shares July 27th, 1896, you being substituted through the clearing house of the Chicago Stock Exchange August 3, 1896, as the purchaser of the said stock.

"This is to notify you that said sales were made by us as agents for Henry Clews & Co. of New York, who may rightfully take any proceedings to enforce the contracts for said sales and who are authorized to make settlements therefor.

Very truly yours, SCHWARTZ, DUPEE & CO."

(This tender of the 700 shares was part of the total tender made to Jamieson & Company on the 1,150 shares sold them.)

The complainants on the next day (the 10th of September) gave Jamieson & Company notice in writing of their intention to sell 700 shares of Diamond Match Company stock, at public sale, to the highest bidder, and named the place and time, and that they would hold Jamieson & Company responsible for any loss on the sale on account of the contracts.

It was further admitted "that Schwartz, Dupee & Company have no claim whatever of any kind or character against the fourteen thousand dollars, seven thousand dollars of which was respectively contributed by Schwartz, Dupee & Company and Jamieson & Company to the clearing house of the Chicago Stock Exchange." And it was testified that the $7,000 deposited by Schwartz & Company were for the account of complainants, in whom is the real interest in such fund.

The stipulation as to facts signed by the parties for the purpose of the trial contained long and detailed statements of the actions of Jamieson & Company and Schwartz & Company in relation to all purchases and sales by them of Diamond Match Company's stock, for both July and August accounts, whether between themselves directly or not, and the stipulation ended with this statement:

"That the transactions heretofore set out in this stipulation of purchase and sale of Schwartz, Dupee & Company, Jamieson & Company and the other brokers whose names are stated, with the exception of those transactions which are marked as substitutions, were had by the brokers on behalf of different clients or principals whom they represented, and those transactions, so far as the different principals are concerned, were not settled or canceled by any of the substitutions, nor by any of the settlements between the brokers, except so far as where one client or principal of a broker was, through such broker, both a purchaser and a seller.

"In other words, the settlements by substitutions or otherwise through the clearing house were merely settlements between the members of the stock exchange, and were not settlements or cancellations of the contracts between the principals whom the brokers represented and the brokers themselves, except where the same broker had both purchased and sold for the same client."

It was also admitted that when complainants gave their orders to sell and at the time that they were executed by Schwartz & Company the latter did not have in their hands any stock of the Diamond Match Com-

pany belonging to the complainants, nor did Schwartz & Company at any time thereafter have in their hands any of the stock of that company, which was the property of the complainants; that the 1,150 shares of capital stock of the Diamond Match Company tendered to Jamieson & Company by Schwartz & Company in behalf of complainants, on August 31, 1896, were not the property of the complainants, nor any part thereof; that the 700 shares of stock alleged to have been sold in the bill of complaint, on September 22, 1896, were not delivered to the alleged purchaser after the sale, but were delivered to J. W. Conley, a member of the firm of Schwartz & Company by the individual who conducted the sale on behalf of the complainants, for safekeeping by Conley. The stock tendered belonged to Schwartz & Company, who tendered it on behalf and for the benefit of complainants.

The various facts set forth in the stipulation form a somewhat complicated mass of detail, and, when taken in connection with the oral evidence and the findings of the master, it is not clear that they are all perfectly consistent.

Upon the hearing before the master, Mr. Joseph R. Wilkins, the secretary and chairman of the Chicago Stock Exchange and manager of the clearing house, was called as a witness in behalf of the complainants. After giving a statement of the manner in which business was done on the exchange in relation to sales for "the account," he testified that the expressions in the telegrams from the complainants to the brokers, in which the word "difference" occurred, did not mean the difference between the then market price of the stock and the contract price, but meant the charges made for carrying the stock for the customer until the next delivery day. The price for this service differs from day to day, and is matter of agreement for each transaction; it is in effect the interest charged by the individual who carries the stock, on the amount necessary to carry it until the next delivery day. The rate of interest differs, of course, according to the demand, and is matter of agreement between the parties. The charge bears no relation whatever to the difference between the market price and the contract price of the stock. He also testified that a sale for "the account" on any day up to the 25th of the month means a sale of the stock which has to be delivered and paid for and taken at the end of the month. In other words, an actual delivery of the stock is contemplated by such a contract, and if a change from that delivery day to the next delivery day, thirty days thereafter, is asked for, it will depend upon the agreement of the parties upon what terms it shall be made. He also said that a sale for "the account" under the rules of the exchange assumed that there might be changes or substitutions of names during the period between the sale and the delivery day, and this happened by reason of the clearing house custom, under which all the sheets showing the transactions

of the brokers in the sales and purchases in a given stock during the day were examined in the clearing house and the sheets balanced, so that at the end it appears there are a certain number of shares sold and the same number bought, and if the sheets do not balance the work stops and does not go on until a balance is made. After the balance is arrived at the substitution of names takes place, and the tickets or cards are sent to the brokers who are "long" and "short" of the stock respectively, and they then send to each other cards confirming the sale each day, and the cash deposit with the committee is added to by the one side and taken from by the other, according to the fluctuation of the stock, so that the full amount of deposit is kept at all times with the committee until the transaction is closed.

In regard to the fluctuations of price from day to day and the manner in which a party selling or buying at a certain price finally obtains or pays it on delivery day, although the original purchaser may have substituted another name at a different price, the witness explained that such original price was realized by means of the margin in the hands of the committee, which was added to daily by the party against whom the price of the stock turned, and drawn from by the party in whose favor it turned, so that, taking such payments and adding the price the stock actually sold for on the delivery day, the party selling or purchasing obtains his original selling or purchase price, which results in a loss or a gain, as the price of the stock on delivery day is higher or lower than the original contract price.

Mr. Justice PECKHAM, after making the above statement of facts, delivered the opinion of the Court.

It is contended that there is an adequate and complete remedy at law for any liability that may arise by reason of the transactions above set forth, and that therefore the bill was properly dismissed and the decree of dismissal should be affirmed by this court.

It is undisputed that the defendants, the governing committee of the stock exchange, have in their hands the sum of $14,000, the absolute title to which they do not claim. That sum was deposited with them by Schwartz & Company and Jamieson & Company, each depositing one-half, for the purpose of thereby securing the performance of the contract entered into by those parties, and which sum was only to be taken from the possession of the governing committee for the purpose of fulfilling the condition upon which its deposit with the committee was made. As that committee had no personal interest in or title to the fund and it was placed in its possession in the trust and confidence that it would see that the purposes of the deposit were fulfilled and the moneys paid out only in accordance with the terms of the trust under which it was deposited, there can be no question that

the fund thereby became a trust fund in the possession of the governing committee and the disposition of which in accordance with the trust those members were called upon to secure. The complainants claim that pursuant to the conditions of the trust they are entitled to the money deposited with the committee. It is shown that the money deposited by Schwartz & Company was deposited by them for and in behalf of the complainants, and Schwartz & Company lay no claim to the fund or any portion of it. Complainants demanded from the committee the payment of the whole fund to them on the ground that they were entitled to such payment by the terms of the trust, and because of the violation of the contract by Jamieson & Company, to secure which the latter deposited $7,000 of the fund in question. The committee has refused to pay over any portion of this fund to complainants, although it lays no claim to it, or any portion of it, on its own behalf. There is a dispute in regard to the right of the complainants to any portion of this fund, and a refusal on the part of the committee to pay it over to them. By reason of the facts, the committee occupied, from the time of the deposit of the funds, a fiduciary relation towards the parties depositing it, and it became a trustee of the fund charged with the duty of seeing that it was applied in conformity with the provisions creating it.

Pomeroy in his work on Equity Jurisprudence, second edition, instances, among other equitable estates and interests which come within the jurisdiction of a court of equity, those of trusts. In volume one, at section 151, he says: "The whole system fell within the exclusive jurisdiction of chancery; the doctrine of trusts became and continues to be the most efficient instrument in the hands of a chancellor for maintaining justice, good faith and good conscience; and it has been extended so as to embrace not only lands, but chattels, funds of every kind, things in action and moneys."

All possible trusts, whether express or implied, are within the jurisdiction of the chancellor. In this case the committee, as trustee, was charged with the performance of some active and substantial duty in respect to the management and payment of the funds in its hands, and it was its duty to see that the objects of its creation were properly accomplished. The fact that the relief demanded is a recovery of money only is not important in deciding the question as to the jurisdiction of equity. The remedies which such a court may give "depend upon the nature and object of the trust; sometimes they are specific in their character, and of a kind which the law courts cannot administer, but often they are of the same general kind as those obtained in legal actions, being simply recoveries of money. A court of equity will always, by its decree, declare the rights, interest or estate of the *cestui que trust*, and will compel the trustee to do all the specific acts required of him by the terms of the trust. It often happens that the *final* relief to be obtained by the *cestui que trust* consists in the

recovery of money. This remedy the courts of equity will always decree when necessary, whether it is confined to the payment of a single specific sum or involves an accounting by the trustee for all that he has done in pursuance of the trust, and the distribution of the trust moneys among all the beneficiaries who are entitled to share therein." (1 Pom. Eq. Jur. s. 158.)

In cases where the equity doctrine of trusts has been extended so as to embrace other relations of a fiduciary kind, while it may not be said that a court of equity possesses exclusive jurisdiction, yet it is well settled that in such case there is so much of the trust character between the parties so situated that the jurisdiction of equity, though not exclusive, is acknowledged. (1 Pom. Eq. Jur. s. 157.)

In *Foley* v. *Hill*, (2 H. of L. Cas. 28,) a question arose over that sort of relation which exists between a banker and his depositor, and it was held to be merely that of debtor and creditor. The court added however that, as between principal and factor, an equitable jurisdiction attached, because the latter partook of the character of a trustee, and that "so it is with regard to an agent dealing with any property. . . . And though he is not a trustee according to the strict technical meaning of the word, he is *quasi* a trustee for that particular transaction," and, therefore, equity has jurisdiction.

In *Marvin* v. *Brooks*, (94 N. Y. 71,) it was held that an agent who had been entrusted with his principal's money to be expended for a specific purpose might be required to account in equity, and that upon such an accounting the burden was upon him to show that his trust duties had been performed and the manner of their performance. The jurisdiction was placed upon the ground of a fiduciary or trust relation, and it was held that a court of equity had jurisdiction over trusts and those fiduciary relations which partake of that character, and in such cases the right to an accounting is well established; but it was held that the existence of a bare agency was not sufficient. It must be an agency coupled with some distinct duty on the part of the agent in relation to funds or some specific property.

In 2 Story's Eq. Jur. (12 ed.) it is stated, at section 975*a*, that in general a trustee is suable in equity in regard to any matters touching the trust.

In *Oelrichs* v. *Spain*, (15 Wall. 211, 228,) the court remarked that there being an element of trust in the case, that element, wherever it existed, always confers jurisdiction in equity.

That the governing committee could file a bill of interpleader against the complainants and the other defendants, alleging that each claimed the fund, or some portion thereof, and ask the court to determine which of the parties was entitled to the same, furnishes no reason for excluding the jurisdiction of equity in this case.

It may be somewhat doubtful whether an action against these defendants could be maintained at law, the contract not being originally between Schwartz & Company and Jamieson & Company, but only becoming so by way of substitution under the rules of the clearing house, and the relief sought being different between the two sets of defendants, Jamieson & Company and the members of the governing committee of the stock exchange. The maintenance of this suit enables the whole question between all the parties to be determined therein, and prevents the necessity of any action at law or other proceeding in the courts for the purpose of determining the ultimate and final rights of all the parties to this suit. Such relief cannot be obtained in any one action at law.

Upon all the facts we think that the jurisdiction of the court was plainly established, because under the circumstances the complainants had no adequate and full remedy at law.

We are then brought to the question decided by the Circuit Court, which held that there was no privity of contract between the complainants and Jamieson & Company. Aside from the general rule that a party sending an order to a broker doing business in an established market or trade for a transaction in that trade, thereby confers upon the broker authority to deal according to any well-settled usage in such trade or market, (*Bibb* v. *Allen*, 149 U. S. 481, 489,) it plainly appears in this case from the pleadings that the sales and purchases of stock were in fact made subject to the rules of the exchange, the complainants alleging in their bill that such was the fact, while the defendants Jamieson & Company in their answer make a like claim.

All the transactions regarding the sales and purchases of the various shares of stock mentioned in this case must, therefore, be regarded as having taken place with direct reference and subject to those rules.

The Circuit Court did not question that upon the facts stated a contract came into existence whereby primarily Schwartz & Company were obliged to sell to Jamieson & Company 700 shares of the stock named at the price of $222 per share, and it found no difficulty in holding that the undisclosed principals of either of these parties were entitled to step into the places of these respective brokers, and in their own name and for their own benefit insist upon the enforcement of the contract according to its terms; that under the rules of the exchange each of the brokers bound himself to the other broker and the principals whom the other broker represented to carry out the terms of the contract, but the court held that the evidence disclosed that Schwartz & Company were only clothed with the authority to sell the stock at $229, and that their principals, the complainants herein, were not bound by a sale at any figure less than that sum, and that neither Schwartz & Company nor any persons with whom that firm had contracted could have compelled the complainants to deliver the stock

at a price less than $229. As the fact appeared that the contract between the respective brokers was for a sale at $222, the defendants Jamieson & Company, even under the substitution provided for by the rules of the stock exchange, could not hold complainants as principals of the contract for a sale at that price, and the court held that for want of mutuality the complainants are in no position to hold those defendants; that there was no identity of contract between the one the complainants authorized and the one entered into between the brokers, and the fact that the complainants now choose to accept it is of no consequence, the legal fact remained that they are not so bound, and, not being so bound, the defendants Jamieson & Company on their part are not legally bound.

In this case, although the brokers on the exchange acted in their own name, yet in fact each acted for undisclosed principals. In regard to 700 shares Schwartz and Company acted for the complainants, and in regard to 450 shares they acted in behalf of other clients. If the contract had been for the sale and purchase of these shares at $229, there would have been no difficulty in the case upon the principle adopted by the Circuit Court. The bar to a recovery lay in the alleged fact that the sale was without authority, although really procured by Schwartz & Company while acting as agents of the complainants.

A principal can adopt and ratify an unauthorized act of his agent who in fact is assuming to act in his behalf, although not disclosing his agency to others, and when it is so ratified it is as if the principal had given an original authority to that effect and the ratification relates back to the time of the act which is ratified. He must disavow the act of his agent within a reasonable time after the fact has come to his knowledge, or he will be deemed to have ratified it. Bringing a suit upon the contract of his agent which was unauthorized at the time and in excess of the authority conferred upon the agent is a ratification of the unauthorized act; and it is no answer to the ratification that prior to its taking place the principal is not bound, and hence there is no right on the part of the other party to enforce as against him the unauthorized act of his agent. These principles are well known, and may be found laid down in the following text books and authorities: Story on Agency, 9 ed. sec. 90, note 7; secs. 248, 251 and 251*a*, and note; secs. 258, 259; Livermore on Agency, page 44; Dunlap's Paley on Agency, 4th Am. ed. marginal page 324, note; *Lucena* v. *Crufurd*, (1 Taunton R. 325, 334, 336;) *Routh* v. *Thompson*, 13 East, 274, 283;) *Hagedorn* v. *Oliverson*, (2 Maule & Selw. 485;) *Fleckner* v. *United States*, (8 Wheat. 338, 363;) *Law* v. *Cross*, (1 Black. 533, 539,) citing *Hoyt* v. *Thompson*, (19 N. Y. 207, 218, 219;) *Cooke* v. *Tullis*, (18 Wall. 332, 338.)

Therefore if in fact the sale at $222 had been unauthorized on the part of Schwartz & Company, the subsequent ratification of their unauthorized

act by the complainants was the same as a precedent authority to them. The failure of the complainants to repudiate the action of their agents in the sale immediately after it was reported to them would operate as a ratification. They not only failed to repudiate, but actually approved the action, and notified the defendants Jamieson & Company that the sales made by Schwartz & Company to the extent of 700 shares of stock had been made for them, and that they should hold Jamieson & Company liable upon the contract and for any damage caused by its violation.

It is argued, however, on the part of complainants that there was no unauthorized action by Schwartz & Company, and in proof thereof an explanation is given and an argument made founded thereon in relation to the peculiar facts which attend the sale and purchase of stock on "the account" on the floor of the stock exchange at Chicago. The very term itself imports, as is stated and as the evidence shows, a sale of stock to be delivered at a future time, and under the rules of the exchange that time means the last day of the month in which the sale or purchase is made.

Under these same rules, when an agreement to sell for future delivery is effected, each party places a margin in the hands of the governing committee for the purpose of securing the performance of the contract, and, as is set forth in the foregoing statement of facts, this sum is kept intact in the hands of the committee until the final closing of the transaction, and upon a sale for "the account" the fluctuation in the price of the stock is provided for by payment into the fund upon the part of the one against whom the price of the stock has turned, and by drawing out of that same fund by the party in whose favor the price was, and so at the delivery day, whatever the price may be, the party selling gets the market price of the stock on that day, and the difference between that and the contract price he has received by payments into the fund in the hands of the governing committee by the other party and his withdrawal of the same sums, making in that way the contract price of the stock. Hence, it is argued, on the part of complainants that the sale at $222 was entirely proper, and in accordance with the previous authority given complainants' agents, because the difference between $229 and $222 complainants' agents had already received by a draft drawn upon the fund in the hands of the governing committee. This is upon the assumption that there had been a margin put up by the parties to the sales on the July account in accordance with the rules, which had been carried over to the August account, and that into this deposit the money had been paid as the stock dropped from July 25 to August 3, and Schwartz & Company had drawn the same out.

If this plainly appeared in the testimony, the findings or the stipulation of the parties, it would be an answer to the contention that the act of Schwartz & Company in selling at $222 was unauthorized. It is, however, answered on the part of Jamieson & Company that there is no evidence

that this fund had been drawn from and paid into by the respective parties, and hence there is no basis of fact appearing in the record upon which the argument can rest. Counsel allege that the statements on the part of the complainants are at variance with the conceded facts in the case. They say in the first place that the bill itself avers that this deposit was made when the contract of August 3, for 1,150 shares, was entered into, and that the answers of the governing committee and of Jamieson & Company expressly state that the deposit was made on that day. If this fund were not created until August 3, it could not have been drawn from by the agents of complainants in the July previous, and so it would be impossible for the complainants to have received moneys from that fund prior to that date. Although the rules of the stock exchange require the deposit of these margins, and in cases where a sale for "the account" has been changed from one month to the following, the rules and the practice of the exchange require that the deposit on the old account shall be transferred to the new, yet still it is said that the rules or practice requiring such deposit cannot supply the place of evidence of a fact when the pleadings expressly state the opposite.

It seems to us quite evident, after a perusal of the whole record and from the manner in which the case was tried, that it was assumed that a deposit of the moneys for the first July sales was made and that such deposit remained and went over into the new account of and for August delivery, although such assumed fact may be inconsistent with the allegation in the pleadings in regard to the date of the deposit, which was alleged to be August 3. There is perhaps this technical inconsistency, yet assuming it to be as claimed on the part of counsel for Jamieson & Company, it does not touch the fact that the complainants ratified the action of their agents, Schwartz & Company, in selling at $222.

Aside from these questions, however, it is claimed on the part of Jamieson & Company that the record shows there never was any privity of contract between these parties, complainants on the one side, and Jamieson & Company on the other, because there were contracts on the part of Schwartz & Company for other dealers in the same stock, and that such contracts were not closed on August 3. Their claim is, even assuming that on August 3 Schwartz & Company contracted to sell to Jamieson & Company 1,150 shares of stock at $222, deliverable August 31, the record shows that the complainants were not alone the interested parties to that contract. It is averred that 700 shares of the 1,150 shares sold by Schwartz & Company to Jamieson & Company, on August 3, were for the account of the complainants, but it also appears that of the 1,150 shares, 450 were sold for the account of others. These latter shares have, however, been settled for between the respective brokers. We are not concerned with the terms of the settlement or any admission or liabilities resulting therefrom,

but the fact of such settlement eliminates all questions in regard to those 450 shares and leaves the 700 shares remaining, which were the shares sold by Schwartz & Company as agents for the complainants. The fact that there were in this sale of August 3 other shares than the 700, and that in regard to those others some had been sold originally by Schwartz & Company to other and different brokers than Jamieson & Company, will not prevent the contract as to the 700 shares from being enforced by complainants against Jamieson & Company, although but for such settlement there might have been some embarrassment in maintaining a suit against the latter for a portion only of the total shares sold them, while the other portion was represented by different clients of Schwartz & Company. The splitting up of the contract into two or more claims in behalf of different principals of Schwartz & Company and bringing different suits by the different principals against Jamieson & Company, on the single contract might be in violation of the general rule refusing to recognize such right, but where all other claims have been settled and there remains but the one demand against the defendants, the objection does not apply, and we see no reason why the complainants may not take advantage of the contract made by their agents and enforce the same against Jamieson & Company.

Selling "for the account" is not an invention of the Chicago Stock Exchange. It has been practiced upon the London and the New York and other stock exchanges for many years, and the general rules governing it are much the same on all of them. Thus it is said in Dos Passos on Stock Brokers and Stock Exchanges, page 276, as follows:

"It also appears in accordance with the usages of the stock exchange that the broker may, in executing the order of a client, enter into a contract for the the specific amount of stock ordered to be bought or sold, or may include such order with others he may have received in a contract for the entire quantity or in quantities at his convenience.

"Neither in stock exchange contracts is there any real appropriation to any particular client of any particular stock in any transaction entered into with the jobber. Each transaction only forms an item in an account with that jobber, or, more correctly, with the house generally—that is to say, specific delivery or acceptance of that amount of stock is not necessarily made; but the transaction is liable to be balanced at any time during that account by a counter transaction by the same broker on behalf of the same or any client, or even on his own behalf, so that the balance only of all purchases and sales of that particular stock made by the broker in the house generally is to be finally accepted or delivered by him, and this through the instrumentality of the clearing house and the system of tickets."

The rules of the Chicago exchange clearly contemplate and provide for a substitution of names between the selling and the delivery days, and each party is kept secured by the margin originally put up, which is added to and taken from as the stock fluctuates in price from day to day. Hence it may

be that the parties buying or selling may by virtue of this rule be liable to different principals represented in one original contract between the brokers. Whatever the rules or practice of the exchange may be, it is of course plain that no principal can be held to the performance of a contract which he never made, authorized or ratified. The stipulation made between the parties relating to this matter, while not entirely plain, might affect the right to maintain this action but for the fact that all other claims were settled, leaving only the controversy regarding the 700 shares to be disposed of between these parties. Upon the facts before us we think there was sufficient privity of contract between them to sustain this suit.

The view taken by the Circuit Court of Appeals in regard to this case was that the contracts were void as being in violation of the terms of the Illinois statute, sections 130 and 131, which are set forth in the margin.* It is a very far-reaching decision, and if followed would invalidate most transactions of every stock exchange in the country "for the account." We are unable to agree with the opinion of the court on this question.

"The generally accepted doctrine in this country is, as stated by Mr. Benjamin, that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them; but such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer; and, if under guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void."

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*SEC. 130. Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any such commodities, shall be fined not less than $10 nor more than $1,000 or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.

SEC. 131. All promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages or other securities or conveyances made, given, granted, drawn or entered into, or executed by any person whatsoever, where the whole or any part of the consideration thereof shall be for any money, property or other valuable thing, won by any gaming or playing at cards, dice or other game or games, or by betting on the side or hands of any person gaming, or by wager or bet upon any race, fight, pastime, sport, lot, chance, casualty, election or unknown or contingent event whatever, or for the reimbursing or paying any money or property knowingly lent or advanced at the time or place of such play or bet, to any person or persons so gaming or betting, or that shall, during such play or betting, so play or bet, shall be null and void and of no effect.

This quotation with the doctrine therein stated is approved in *Irwin* v. *Williar*, (110 U. S. 499, 508.)

As a sale for future delivery is not on its face void, but is a perfectly legal and valid contract, it must be shown by him who attacks it that it was not intended to deliver the article sold, and that nothing but the difference between the contract and the market price was to be paid by the parties to the contract. And the fact that at the time of making a contract for future delivery the party binding himself to sell has not the goods in his possession and has no means of obtaining them for delivery, otherwise than by purchasing them after the contract is made, does not invalidate the contract. (*Hibblewhite* v. *McMorine*, 5 M. & W. 462.) Parke, Alderson and Maule, barons, before whom the case was heard, were unanimously of this opinion.

In order to invalidate a contract as a wagering one, both parties must intend that instead of the delivery of the article there shall be a mere payment of the difference between the contract and the market price. (*Pearce* v. *Rice*, 142 U. S. 28; *Pickering* v. *Cease*, 79 Ill. 328.) In the latter case it was stated:

"Agreements for the future delivery of grain, or any other commodity, are not prohibited by the common law, nor by any statute of the State, nor by any policy adopted for the protection of the public. What the law does prohibit, and what is deemed detrimental to the general welfare, is speculating in differences in market values. The alleged contracts for August and September come within this definition. No grain was ever bought and paid for, nor do we think it was ever expected any would be called for, nor that any would have been delivered had demand been made. What were these but 'optional contracts,' in the most objectionable sense? That is, the seller had the privilege of delivering or not delivering, and the buyer the privilege of calling or not calling for the grain, just as they chose. On the maturity of the contracts they were to be filled by adjusting the differences in the market values. Being in the nature of gambling transactions, the law will tolerate no such contracts."

And in *Pearce* v. *Rice*, (142 U. S. 28, 40,) it was remarked:

"But the evidence before us is overwhelming to the effect that the real object of the arrangement between Hooker & Company and Foote was, not to contract for the actual delivery, in the future, of grain or other commodities—which contracts would not have been illegal (*Pickering* v. *Cease*, 79 Ill. 328, 330)—but merely to speculate upon the rise and fall in prices, with an explicit understanding, from the outset, that the property apparently contracted for was not to be delivered, and that the transactions were to be closed only by the payment of the differences between the contract price and the market price at the time fixed for the execution of the contract."

A contract which is on its face one of sale with a provision for future delivery, being valid, the burden of proving that it is invalid, as being a mere cover for the settlement of "differences," rests with the party making

the assertion. A defense of the illegality of the contract was pleaded by the defendant in *Cothran* v. *Ellis*, (125 Ill. 496.) In speaking of the burden of proof the court (at page 506) said:

"The facts alleged in the defendant's pleas and put in issue by the plaintiff's traverse are the only controverted facts in this case, and the *onus probandi* was upon the defendant. If the latter had offered no evidence at all, it would not have been necessary for the plaintiff to offer any, for the jury are always bound to find the facts against the party having the burden of proof, if he offers no evidence in support of the issues."

In *Irwin* v. *Williar*, (110 U. S. 499–507,) the trial judge in substance charged the jury that the burden of showing that the parties were carrying on a wagering contract and were not engaged in legitimate trade or speculation rests upon the defendant. Contracts for the future delivery of merchandise or stock are not void, whether such property is in existence in the hands of the seller or to be subsequently acquired. On their face these transactions are legal, and the law does not, in the absence of proof, presume that the parties are gambling. The proof must show that there was a mutual understanding that the transaction was to be a mere settlement of differences; in other words, a mere wagering contract. This charge was approved by this court, and the principle was again approved in *Bibb* v. *Allen*, (149 U. S., *supra*.)

Taking the contracts in this case as evidenced by the various telegrams passing between the complainants and their agents, Schwartz & Company, and having in mind the manner in which the business was in fact transacted, we are unable to find any evidence upon which to base a holding that the contracts came within the statutes of Illinois on the subject of gaming. There was no proof that there was a mutual understanding that the transactions were to be settled by a mere payment of "differences," and that there was to be no delivery, nor, in our judgment could any inference to that effect be legitimately drawn from the undisputed facts. In the first place it is proper to consider the rules of the stock exchange where the business was done. We find that article 17 of the constitution provides in section 1, "that no fictitious sale shall be made. Any member contravening this section shall upon conviction be suspended by the governing committee." Article 29 prohibits any member of the exchange from being interested in or associated with any organization engaged in the business of dealing in differences or quotations on the fluctuations in the market price of any commodity or security, without a *bona fide* purchase or sale of said commodity or security in a regular market or exchange. These two rules provide on their face that no sale for mere collection of differences is allowed; that every sale must be one in good faith for the delivery, either present or future, of the article sold. Sales "for the account" under the rules are made upon the basis of an intended actual delivery of the stock at the time when due. The evidence upon this point is undisputed.

A contract for the mere settlement of differences is a violation of the rules of the organization under which these brokers were doing business. Neither the rules of the exchange nor those of the clearing house set forth in the foregoing statement provide for these wagering contracts. Some of them provide for the course to be pursued where a member fails to fulfill his contract. They do not provide as a means for the fulfillment of such contract the payment of "differences," but point out a course which the party claiming the fulfillment may pursue as against the party who violates the contract. Rule 17 treats the party failing to fulfill as a defaulter, and his name as a defaulter is announced. Sections 1 and 2 of article 16 provide for the failure of either party to keep up his margin, and the failure is described as a default. To say that such rules afford strong ground to infer an understanding between the parties doing business subject to them—that their contract was not one of actual sale, but merely one to speculate upon "differences"—is, in our opinion, to presume an illegal contract against its plain terms, and without any sound basis for the presumption. Thus, if an individual agreeing to purchase and pay for certain stock at a future date fails or refuses to perform his contract, the stock is sold under the rule, the price received and the difference between the price at which it sold and the contract price he is held answerable for. That would be his legal liability, in any event, and we cannot agree that the rules made for the case of a violation of contract provide or were intended to provide a means for its fulfillment. In case of a violation, the rules merely afford an expeditious means of ascertaining the amount of the damages. Of course, we do not say that these rules actually prevent gambling on the exchange. It is possible, if not probable, that gambling may be and is in fact carried on there, but it must be in violation of and not pursuant to the rules.

Recurring, then, to the terms of these contracts, there is nothing therein which shows that they were gaming contracts, and hence in violation of the Illinois statute. They were plain directions to sell certain named stock for "the account," the meaning of which was that the stock was to be sold for actual delivery on the next delivery day, being the last day of the month. Such a direction presumes the intention to deliver the stock at the time named upon the receipt of the purchase price thereof as agreed upon at the time of the sale. There is no presumption opposed to this view in the absence of any evidence upon which it can rest. The fact that at the time of the sale the complainants did not own any of the stock cannot support the presumption, because it is perfectly valid to make such a sale, and an illegal intent accompanying the performance of a perfectly legal act cannot be presumed. The subsequent telegrams directing the changing of the delivery time from the July to the August account, after inquiring in regard to the difference upon which such change could be

effected, furnish no evidence of any illegal intention in connection either with the original or the changed contracts.

The "difference," as explained by the testimony set out in the foregoing statement, related to the charges to be made for carrying the stock from the July to the August delivery day, and did not relate to the payment of any difference between the contract price and market price of the stock. A direction to change the 500 shares from the July account to the August account would mean, as Mr. Wilkins, the manager of the stock exchange, testified, that the party who had agreed to sell 500 shares of stock, deliverable in July, did not wish to deliver on that day, and the direction to change to the August account meant that the agents were to buy in that number of shares and sell them out again for the August account, keeping "short" the same amount of stock and making the difference in that case of $2.50 a share, or $250 on every 100 shares of stock, for carrying it for another month, and this charge was the interest which the party would have to pay to him who was on the other side of the market and who would carry it to the next delivery day, 30 days thereafter.

There is nothing in the whole transaction from which it can be reasonably said that at the time when the original July order to sell was given there was any intention to do otherwise than make delivery of the stock at the July settlement day, and a delivery must have been then made by the very terms of the contract, as also under the rules of the exchange, unless there might thereafter be a change of that agreement by postponing the delivery to the August account. If there were no such subsequent agreement, then the delivery must have been made in July, but the seller might, in order to make it, enter into another agreement with some one else to take it off his hands upon such terms as might be agreed upon. There is absolutely no evidence that these contracts were entered into pursuant to any understanding whatever that they should be fulfilled by payments of the difference between the contract and the market price at the time set for delivery. To hold otherwise would entirely prevent any dealing in stocks for "the account," including of course a case where for any reason the delivery day should be changed from the one originally intended to another and a future day.

To uphold the rulings of the Circuit Court of Appeals herein the cases of *Pickering* v. *Cease*, (79 Ill. 328,) *Lyon* v. *Culbertson*, (83 Id. 33,) *Tenney* v. *Foot*, (95 Id. 99,) *Pearce* v. *Foot*, (113 Id. 228,) *Cothran* v. *Ellis*, (125 Id. 496,) *Schneider* v. *Turner*, (130 Id. 28,) *Soby* v. *The People*, (134 Id. 66,) have been cited. We have examined them all, and are unable to see that they justify the ruling herein.

These cases hold these various propositions:

(1) That "option contracts" to sell or deliver grain or other commodity, or railroad or other stock, which contracts are intended to be settled by

payment of differences at the settling date, are invalid. (79, 83, 113 and 125 Ill. *supra.*)

(2) A contract to have or give to himself an option to sell or buy at a future time any grain, &c., subjects the party to fine or imprisonment, and all contracts made in violation of the statute are gambling contracts and void under section 130, Criminal Code, and all notes or securities, part of the consideration of which is money, &c., won by wager upon an unknown or contingent event, as described in section 131 of the code, are also void. (95 and 113 Ill. *supra.*)

(3) An "option contract" to sell or buy at a future time grain or other commodity or stock, &c., is void under the Illinois statute, even though a settlement by differences was not contemplated. (130 Ill. *supra.*)

(4) The keeper of a shop or office where dealing is carried on in stock, &c., on margins, without any intention of delivering articles bought or sold, is guilty of an offense under the Illinois act of 1887. (134 Ill. *supra.*)

The cases of *Pearce* v. *Rice*, (142 U. S. *supra*,) and *Irwin* v. *Williar*, (110 Id. *supra*,) are referred to in some of these cases as holding that dealings in differences, where the contract provides therefor, are void.

These Illinois cases, it will be seen upon examination, do not touch the case before us, which is a contract for future delivery, where there is no evidence that such delivery was not contemplated and a settlement by payment of differences only intended. The "option contracts" spoken of in those cases are explained in the cases themselves to mean what is commonly called "puts and calls," where there is no obligation on the part of the person to sell or to buy, and that class of contracts is the class covered by the statute. There is nothing in the evidence in this record that seems to us to afford any reasonable ground for holding that the contract in this case was on its face illegal as in violation of any statute in Illinois, or that, while valid on its face, the contract was really a guise under which to enable the parties to gamble on the differences in the price of stock sold and bought.

The further objection that these contracts having been made with reference to the rules of the exchange, the parties must in pursuing a remedy be confined to that which the rules provide, to the exclusion of the jurisdiction of ordinary courts of justice, we do not regard as well taken.

The sales were made subject to the rules referred to, but so far as regards a remedy for their violation, those rules provide a means by which parties may seek and obtain relief in accordance with their terms. They do not assume to exclude the jurisdiction of the courts, or, in other words, they do not assume to provide an exclusive remedy which the parties must necessarily follow, and which they have no right to refuse to follow without violating such rules, and thereby violating their contract. Any rule which would exclude the jurisdiction of the courts over contracts or transactions such as are here shown would not be enforced in a legal tribunal.

25403

It is also objected that the means taken to obtain a price for the stock after a tender thereof had been refused by Jamieson & Company were inadequate for that purpose, if not fraudulent, and that, hence, there is no proof properly before the court as to the value of the stock on August 31, when it was tendered, or September 22, when it was sold, and it is also contended that there was no fair sale, but a mere sham, colorable in itself and fraudulent as against the defendants Jamieson & Company; that the only price of the stocks contemplated in the contracts at the time they were entered into and in case of a violation thereof, was the price to be fixed by the stock exchange by actual sales on the delivery days, and that as the exchange was closed from August 3 until November 5 following, no means existed by which that price could be ascertained.

We think the course pursued by the complainants was a proper one. On August 31, the exchange being closed, Schwartz & Company, acting in behalf of the complainants, tendered to Jamieson & Company 1,150 shares of the stock in question, 700 of which included the shares sold by them for the complainants. This tender was refused. It is objected that the stock did not belong to the complainants when tender thereof was made to Jamieson & Company. That was not material. Their agents, Schwartz & Company, who did own the stock, made tender of it to Jamieson & Company and demanded the contract price in payment thereof. If that price had been paid and the delivery of the stock made to Jamieson & Company it would have been a good delivery. They would have had the title to the stock as against every one, Schwartz & Company included. It was a matter, therefore, of no importance that the complainants at the time this stock was tendered did not have the legal title to it. Under these circumstances, what could the complainants or their agents, Schwartz & Company, do? A tender of the stock had been made and had been refused. The stock exchange was closed by order of its governing committee, and Jamieson had voted in favor of its closing. Were there no means by which the value of the stock at or about this time could be ascertained while the stock exchange was closed? We think there were, and we also think that the course pursued by the complainants was a proper and appropriate one.

Accordingly Jamieson & Company were notified that the stock would be sold to the highest bidder at a time and place mentioned, and that they would be held responsible for any loss that might result from their refusal to take and pay for the stock as agreed upon. They were also informed at or about that time that the sales made by Schwartz & Company had been made for complainants as to 700 of such shares. On the day named the stock was put up for sale, and it is not an important fact that it did not belong to the complainants. It was stock over which they had control, and it was offered for sale on the part of the complainants

with the approval and assent of its owners, and if it had been bought by any individual at the sale other than the one who did bid it in such purchaser would have obtained a good title to the stock on payment of the price bid. Wide publicity had been given on the part of the complainants of the time when and the place where this sale would occur, and the highest bid was made by an individual who was a member of the firm of Schwartz & Company, but there were many other people there who had the right, and, as it appears, were urged to bid, and there was neither fraud nor deception in the fact that a bid was made by a member of the firm as stated. The price at which the bidding closed was fixed after a chance for full and open competition upon the part of all who were present, and although the complainants entered into some arrangement with their agents by which the latter 'produced the stock and offered it for sale on account of and for the complainants, yet no injurious effect upon the transaction was thereby caused, and it in no way injured Jamieson & Company. That the bid was a fair indication of what was then regarded as the value of the stock, we think admits of very little question. When the exchange opened in November the stock sold at $130, and continued near that figure for some time.

Under all the facts in the case we think the complainants were justified in the course they pursued, and that the price at which the stock sold was a fair basis upon which to determine the amount of damages sustained by the complainant by reason of the refusal of Jamieson & Company to fulfill their contract of purchase.

For these reasons the decrees of the Circuit Court of Appeals and the Circuit Court must be reversed, and the case remanded to the latter court for such further proceedings therein as are not inconsistent with the opinion of this court.

So ordered.

Mr. Justice HARLAN dissented.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 245.—October Term, 1900.

Henry Clews, Charles M. Foster and James B. Clews, Petitioners, *vs.* Malcolm M. Jamieson, Roland C. Nickerson, Harry F. Billings, et al.	On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[May 27th 1901.]

Mr. Justice Harlan, dissenting:

I dissent from the opinion and judgment in this case upon the ground stated by the Circuit Court of Appeals, namely, that the transactions involved in this litigation constituted gambling in "differences," in violation of the statute of Illinois.

True copy.

Test:

Clerk Supreme Court, U. S.